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In a recent Tennessee case—American Handle Co. v. Standard Handle Co., 59 S.W. Rep. 709, the Court of Chancery Appeals of Tennessee undertook to construe the anti-trust statute of that State enacted in 1891. Section 1 of the act makes unlawful and invalid any trust, contract, arrangement, or combination which tended to prevent free and full competition in the sale of any article of domestic growth, production, or manufacture. Section 5 provided that where a plaintiff was a member of or connected with such illegal trust or combination, and the cause of action sued on accrued out of some business or transaction connected therewith, such fact could be pleaded in complete defense of the suit. It appeared in the case noted that two manufacturing corporations entered into a combination by which a third corporation was created, and its capital stock was advanced and paid for from the assets of the other corporations, and its stock was issued to the stockholders of such corportions. The new corporation was organized under an agreement that it should receive 85 per cent. of the product of each of the other corporations at a low price, to be agreed on by the three corporations, and that it should sell such combined product. The combination prevented competition between the two old corporations, but did not raise the price of the manufactured articles or of raw materials. It was held that the new corporation was not entitled to assert a claim for money advanced to one of the old corporations, which had become insolvent, as against other creditors of the latter, since the combination was unlawful, as tending to prevent competition.

The law pertaining to boycotts has recently been considered by the Court of Appeals of Colorado, in Master Builders' Association v. Domascio, 63 Pac. Rep. 782. Briefly stated it was held in that case that a letter to architects of a building, signed by members of a master builders' association, in which they declined to bid on the building if plaintiff's bid should be received in competition, would not authorize a judgment for damages or the issuance of an injunction against such members, since no coercion or intimidation was suggested, and the architects were at liberty to receive bids from numerous builders who had not signed the letter, and that on notification by a builder to an architect that, if he should receive plaintiff's bid for work, numerous members of a master builders' association would refuse to bid thereon, would not authorize a judgment against such members, in the absence of any evidence to show authority of the builder to give such notice. The court cites the following cases as sustaining its conclusion, viz.: Manufacturing Co. v. Hollis, 54 Minn. 223, 55 N.W. Rep. 1119; Macauley v. Tierney (R. I.), 33 Atl. Rep. 1, 37 L. R. A. 455; Carew v. Rutherford, 106 Mass. 14; Com. v. Hunt, 4 Metc. (Mass.) 111; Hunt v. Simonds, 19 Mo. 583; Payne v. Railroad Co., 13 Lea, 507; Brewster v. C. Miller's Sons (Ky.), 41 S. W. Rep. 301, 38 L. R. A. 505; Cooley, Torts, pp. 278, 688. The following cases, cited in behalf of plaintiff, were reviewed and distinguished, viz.: Van Horn v. Van Horn, 52 N. J. Law, 285; Doremus v. Hennessy, 176 Ill. 608; Casey v. Typographical, 45 Fed. Rep. 135; Jackson v. Stanfield, 137 Ind. 592.

Until recently it seems that there is to be found but one case in which suit was brought on a life insurance policy where the insured had been tried and executed for the commission of a crime. That case is Society v. Balland, 4 Bligh (N. R.), 194, and it is better known and oftener cited as the "Fauntleroy Case." It was an action by assignees in bankruptcy to collect a policy of insurance on the life of one Fauntleroy. The policy was made payable to his administrators or assignees. Fauntleroy was convicted of forgery, then a capital offense, and was executed. Lord Chanceller Lyndhorst held that on the grounds of public policy the assignees could not maintain the suit.

The United States Circuit Court of Appeals of the Fifth Circuit has lately considdered the same question and has reached a similar conclusion as the English court. Burt v. Union Cent. Life Ins. Co., 105 Fed. Rep. 419. The facts in this later case differ slightly from those in the English case,

in this, that in the former the plaintiff avers that the insured was guiltless although convicted and executed. But the court considered this as not material, holding in substance that an action cannot be maintained on a policy of insurance on the life of a person who was convicted by a court of competent jurisdiction of a capital crime, and was executed pursuant to its sentence, although it is alleged that such conviction was erroneous, and the deceased in fact innocent. The policy contained no provision for forfeiture in the event of execution for crime. A policy which in express terms permitted such a recovery would be one in effect insuring against the risk of a miscarriage of justice, and void as against public policy; and, for the same reason, even if a policy can be construed to cover such a risk, because not in terms excluded, it is to that extent void and unenforceable. Mr. Justice McCormick dissented, in a vigorous opinion, from the conclusion of the court.

NOTES OF IMPORTANT DECISIONS.

MASTER AND SERVANT—DISCHARGE OF SERVANT—FALSE STATEMENT OF THIRD PERSON.—In Moran v. Dunphy, 59 N. E. Rep. 125, the Supreme Judicial Court of Massachusetts holds that one who by malevolent advice, by falsehood, or by maliciously putting an employer in fear, brings about the discharge of a servant, is liable in damages to the servant. The court, by Holmes, C. J., said in part:

"But in view of the series of decisions by this court, from Walker v. Cronin, 107 Mass. 555, through Morasse v. Brochu, 151 Mass. 567, 25 N. E. Rep. 74, 8 L. R. A. 524, Tasker v. Stanley, 153 Mass. 148, 26 N. E. Rep. 417, 10 L. R. A. 468, Vegelahn v. Gunther, 167 Mass. 92, 44 N. E. Rep. 1077, 32 L. R. A. 722; Hartnett v. Association, 169 Mass. 229, 47 N. E. Rep. 1002, 38 L. R. A. 194, and Weston v. Barnicoat, 175 Mass. 454, 56 N. E. Rep. 619, to Plant v. Woods, 176 Mass. 492, 57 N. E. Rep. 1011, we cannot admit a doubt that maliciously and without justifiable cause to induce a third person to end his employment of the plaintiff, whether the inducement be false slanders or successful persuasion, is an actionable tort. See also Angle v. Railway, 151 U. S. 1, 13, 14 Sup. Ct. Rep. 240, 38 L. Ed. 551. We apprehend that there no longer is any difficulty in recognizing that a right to be protected from malicious interference may be incident to a right arising out of a contract, although a contract, so far as performance is concerned, imposes a duty only on the promisor. Again, in the case of a contract of employment, even when the employment is at will, the fact that the employer is free from liability for discharging the plaintiff does not carry with it immunity to the defendant, who has controlled the employer's action to the plaintiff's harm. The notion that the employer's immunity must be a non-conductor, so far as any remoter liability was concerned, troubled some of the judges in Allen v. Flood (1898, App. Cas. 1), but is disposed of for this commonwealth by the cases cited. See also May v. Wood, 172 Mass. 11, 14, 15, 51 N. E. Rep. 191. So, again, it may be taken to be settled by Plant v. Woods, 176 Mass. 492, 501, 502, 57 N. E. Rep. 1011, that motives may determine the question of liability; that, while intentional interference of the kind supposed may be privileged if for certain purposes, yet, if due only to malevolence, it must be answered for. On that point the judges were of one mind. See 176 Mass. 504, 57 N. E. Rep. 1011. Finally, we see no sound distinction between persuading by malevolent advice and accomplishing the same result by falsehood or putting in fear. In all cases the employer is controlled through motives created by the defendant for the unprivileged purpose. It appears to us not to matter which motive is relied upon. If accomplishing the end by one of them is a wrong to the plaintiff, accomplishing it by either of the others must be equally wrong."

CRIMINAL LAW — HOMICIDE — THREAT. — In Hall v. Territory it was held by the Supreme Court of New Mexico that, in a trial for homicide, where the question whether the prisoner or deceased commenced the encounter which resulted in death is in any manner of doubt, evidence of uncommunicated general threats of violence made by deceased a few hours prior to the homicide against anyone found in a certain situation is admissible, where there is any evidence of a hostile demonstration against the prisoner by the deceased at the time of the homicide — the deceased finding the prisoner within the scope of said threats — and where there is evidence tending to prove that within a year prior to the homicide there had been communicated to the prisoner numerous threats made against his life by deceased. The court says in part:

"The appellant attempts to justify the homicide by a plea of self-defense, and the pivotal question becomes, who was the aggressor in the conflict? What are the lights which illumine this point? From the standpoint of the territory, only the testimony of the witness Pearl Johnson, with certain seeming corroborating circumstances. From the standpoint of the defense, appellant's testimony, the numerous threats against the appellant's life which deceased had made to appellant and to others during a period covering nearly a year immediately prior to the homicide, and most particularly such threats, though uncommunicated to defendant, made only a few hours before the homicide. Assum-

ing that the threats were not inadmissible upon other grounds, we conclude, in view of the peculiar facts of this case, that the vagueness of the language used by the deceased constitutes no sufficient ground for its exclusion, but that it was a matter for the consideration of the jury, from which they were to determine whether or not the language should be construed as threats made against the appellant. Territory v. Prat (decided at present term of this court), 61 Pac. Rep. 104; State v. Hopper (Mo. Sup.), 44 S. W. Rep. 273; State v. Tarter, 26 Oreg. 38, 37 Pac. Rep. 54; State v. Adams, 76 Mo. 355; State v. Crawford, 99 Mo. 74, 12 S. W. Rep. 354; Brown v. State, 105 Ind. 392, 5 N. E. Rep. 900; State v. Harlan, 130 Mo. 381, 32 S. W. Rep. 997; State v. Fitzgerald (Mo. Sup.), 32 S. W. Rep. 1117; Benedict v. State, 14 Wis. 460; Hodge v. State, 26 Fla. 11, 7 South. Rep. 393; State v. King, 9 Mont. 445, 24 Pac. Rep. 265; Harris v. State (Ala.), 11 South. Rep. 255; Hopkins v. Com., 50 Pa. St. 9; Harris v. State (Miss.), 16 South. Rep. 360, 33 L. R. A. 85; State v. Cushing, 14 Wash. 527, 45 Pac. Rep. 145, 53 Am. St. Rep. 883; Bessette v. State, 101 Ind. 185.

"There are a few cases which hold that threats, to be admissible for any cause, must be shown to have been communicated to the accused, and others which hold that uncommunicated threats are not admissible unless they constitute a part of the *res gestæ*; but the more modern and better-reasoned cases favor the admission of such evidence in the following instances: (*a*) To show who began the affray; (*b*) to corroborate evidence of communicated threats; and (*c*) to show the attitude of the deceased. Certainly this rule is limited to those cases where there is proof of a hostile demonstration by the deceased at the time of the killing, showing a present intention to carry out his purpose. Therefore, to sustain the ruling of the court below, it must appear from the record that there is no evidence in the case to show any hostile movements or attitude of the deceased towards the accused at the time of the firing of the fatal shots, and there is conclusive evidence to the contrary. * * * Wharton, in his work on Criminal Law, section 1027, says: 'When the question is as to what was deceased's attitude at the time of the fatal encounter, recent threats may become relevant to show that this attitude was one hostile to defendant, even though such threats were uncommunicated.' This testimony might, in the state of mind produced upon the jury by the other evidence in the case, have turned the scales in favor of appellant. At all events, we are of opinion that in that condition of things it was relevant to the issue, and should have been admitted. Wiggins v. People, 93 U. S. 465, 23 L. Ed. 941; State v. Cushing, 14 Wash. 527, 45 Pac. Rep. 145, 53 Am. St. Rep. 883; State v. McNally, 87 Mo. 644; Stewart v. State (Tex. Cr. App.), 35 S. W. Rep. 987; Brown v. State, 105 Ind. 392, 5 N. E. Rep. 900; Bell v. State, 66 Miss. 192, 5 South. Rep. 389; Roberts v. State, 68 Ala. 156; Davidson v. People, 4 Colo. 145; Keener v. State, 18 Ga. 194, 63 Am. Dec. 269; 1 Whart. Cr. Law, § 64; Little v. State, 6 Baxt. 493."

CONTRACT—PERFORMANCE—RETAINING CONSIDERATION—ACT OF GOD.—In Board of Education v. Townsend, 59 N. E. Rep. 223, decided by the Supreme Court of Ohio, it was held that where, in consideration of the conveyance by a board of education of a lot on which was situated a school house, and other buildings suitable for a public school, the vendee agreed to convey to the board another lot, then vacant, and to remove, reconstruct and rebuild thereon the school house, so that it would be in a suitable and proper condition for school purposes, it is not a defense to an action for damages for failure to perform the contract with respect to the school house that it was blown down by a storm, and could not, on that account, be removed as a standing building, as the contract was nevertheless capable of substantial performance. The court said in part:

"It seems evident, looking to the entire agreement, that the essential purpose which the parties had in mind was that there should be placed by the defendant, without expense to the board of education, the same facilities in the way of buildings for carrying on the public school there that existed at the time of the contract on the lot then owned and in use by the board. And if, because it was cheaper to do so, or for other reason, the defendant had constructed on the new site entirely new buildings, equivalent of the old ones, that would have been a substantial compliance with his contract, which the board of education could not refuse to accept. The most favorable view that can be taken of the case for the defendant is that under the contract two distinct modes of performance were open to him—one, by removing the school house as a standing building, by means of jacks and rollers, or other appliances; the other, by tearing it down and using the material for its reconstruction—either of which he was at liberty to adopt, and either of which, it may be conceded, would have been a sufficient compliance with his contract. Though the former mode of performance became impossible, the latter was not. And 'it can hardly admit of contradiction,' said the vice-chancellor in Barkworth v. Young, 4 Drew. 1, 24, 25, that where a party is allowed, at his option, to perform his contract in 'one or the other of two modes, and one of them becomes impossible by the act of God, he is bound to perform it in the other mode.' And see State v. Worthington's Exrs., 7 Ohio, 171, 172. This rule rests upon the substantial reason that, so long as the contract is capable of performance in any mode contemplated by the parties, its performance cannot be said to have become impossible. A clearer case for the application of

the rule than the one before us can hardly be conceived. Besides, the act of God, so called, which excuses the performance of a contract because that has become impossible, does not necessarily discharge the party from the obligation arising from the contract, except, it may be, when the contract is wholly executory on both sides. If an artist contracts to paint a picture for $10,000 received from his patron, and thereafter become incapacitated from blindness, to fulfill his promise, by what right is he justified in claiming the money? We are not aware of any principle, and have not been referred to any adjudicated case that would give absolution from the obligations of a contract to a party who has received from the other full consideration for a promise which the former has bcome unable to fulfill, and at the same time protect him in the enjoyment of the consideration paid. The act of God may properly lift from his shoulders the burden of performance, but has not yet been extended so as to enable him to keep the other man's property for nothing. It is plainly apparent from the contract in hand that the parties, as the basis of the agreement, estimated the value of the lot conveyed by the board of education to the railway company to be as much more than that of the lot conveyed to the board as it would cost to place on the latter a school house, in suitable and proper condition for school purposes, and other conveniences for a public school, equivalent to those on the lot owned by the board when the contract was made. And in so far as the defendant has failed to do those things he has received from the board a valuable consideration, which he retains, and for which he has not given what he promised, nor anything whatever. It appears from the agreed statement of facts that the reasonable cost of doing what the defendant so failed to do is $1,000, which amount the plaintiff expended in the fall of 1896 towards placing a school house on the newly-acquired site after demand on the defendant to perform his contract in that behalf, and his failure to do so. We think the judgment below (for defendant) should be reversed.

CONTRACT — INTOXICATION.— The Supréme Court of Ohio decides in Wright v. Waller, that it is no defense to a note that defendant was so intoxicated when he signed it that he could not give the attention thereto which a reasonably prudent man would have given; and that it is no defense to a note that the defendant signed it under such intoxication that he could not give proper attention to it, since intoxication is not a defense unless the contracting party does not know what he is doing. The court says:

"This is in an action by Wright against Waller on a contract in writing signed by the latter, to pay rent. Defendant sought to avoid the contract on the ground that he was intoxicated when he signed it. There was evidence tending to show that defendant was in a state 'of complete drunkenness, dethroning reason, when he signed the paper,' and on the other hand, there was evidence tending to show that he was not drunk at the time. There was no evidence that plaintiff had anything to do with bringing about defendant's intoxicated condition, if he was intoxicated, nor that defendant's mind was impaired by habitual drunkenness, nor that the contract was in itself unconscionable or unfair. On this state of case, the court, in its general charge, said: 'If the defendant was so much under the influence of strong drink or intoxicating liquor that his reason was dethroned to an extent that he could not give that attention to the signing of the note that a reasonably prudent man would be able to give, then the note would be void.'' And at the request of the defendant the court gave the following charge: "If the jury find from the evidence that the defendant signed the note under such intoxication that he could not give proper attention to it, then the note is not evidence in the case, but void.' To each of these instructions the plaintiff excepted, and their soundness *vel non* is the question presented on this appeal. On this question as to the degree of intoxication necessary to an avoidance of contracts, the following are some of the statements of the governing principle, applicable to cases like this, found in the authorities: '* * * intoxication so deep as to take away the agreeing mind—in other words, to disqualify the mind to comprehend the subject of the contract and its nature and probable consequences—impairs such contract, if made while it lasts, the same as insanity. But mere drunkenness, or being a drunkard, or simply being drunk at the time, where the intoxication does not extend to the degree thus stated, will not impair the contract. To have this effect, it must render the party *non compos mentis* for the occasion.' Bish. Cont. §§ 980, 981. 'The contract of a drunken person is voidable, at his option, if it can be shown that at the time of making the contract he was absolutely incapable of understanding what he was doing.' Anson Cont. p. 150. 'An express contract, entered into when the obligor is in a state of intoxication, so as to deprive him of the exercise of his understanding, is voidable.' 11 Am. & Eng. Enc. Law, p. 773. Drunkenness must 'be such as to incapacitate the party from the proper exercise of his judgment, and prevent him from understanding his contract.' Story, Cont. p. 15. 'A drunkard, when in a complete state of intoxication, so as not to know what he is doing, has no capacity to contract.' 1 Benj. Sales, § 33. 'It is evident that drunkenness, when it goes so far as to absolutely destroy the reason, renders a person in this State, so long as it continues, incapable of contracting, since it renders him incapable of consent.' 1 Poth. Cont. 29. 'Where a party, when he enters into a contract, is in such a state of drunkenness as not to know what he is doing, his contract is wholly void,' *i. e.* if he elects to avoid it. 1 Chit. Cont. 192. 'Drunken-

ness is a species of insanity, but the law is not quite clear respecting this disability. Perhaps it stands thus: One cannot defend by proving his drunkenness, unless he can show that the drunkenness was known to the payee, and taken advantage of by him, or that it was complete, and suspended all use of the mind at the time.' 1 Pars. Notes & B. 151. Intoxication, 'to the extent only that the party did not clearly understand the business' in hand, 'is not enough to render the contract voidable or void.' Henry v. Ritenour, 31 Ind. 136. 'It is also urged that the plaintiff in error is not bound by the transaction, because he was drunk at the time he assigned the note. We think the evidence shows that he was at the time drunk. But he was manifestly not so drunk but he knew what he was engaged in at the time. He, on the trial, testified to the circumstances attending the transaction. He says he took out the note and threw it down, and told them to take it, and that they had better take his clothes. Had he been so drunk as to render the assignment void, he could not have known or remembered what he did. To render the transaction voidable, he should have been so drunk as to have drowned reason, memory, and judgment, and impaired his mental faculties to an extent that would render him *non compos mentis* for the time being.' Bates v. Ball, 72 Ill. 108, 111. 'Drunkenness, to afford a ground for avoiding a contract, must be so excessive as to render the person incapable of consent, or for the time to incapacitate him from exercising his judgment.' Reynolds v. Dechaums, 24 Tex. 174. A contract executed by an intoxicated person is valid if 'he is aware of what he is doing, and is not deceived as to the identity of the paper signed.' Miller v. Finley, 26 Mich. 240. 'Where a party seeks to avoid an express contract on the ground that he was intoxicated at the time he entered into it, it is incumbent on him to produce clear and satisfactory proof that he was at the time in such a state of drunkenness as not to know what he was doing or the consequences of his own acts.' Johns v. Fritchey, 39 Md. 258. 'A contract made by a person while he is so drunk as to be incapable of understanding its nature and effect is voidable, * * * but his intoxication must be so excessive as to render him incapable of knowing what he is doing.' Clark, Cont. pp. 274, 275.

The foregoing texts and adjudications clearly declare and thoroughly establish the modern doctrine on this subject, departing from the ancient rule, which forbade a party to a contract to stultify himself by setting up his want of mental capacity to enter into it, to the extent, and only to the extent, of allowing him to show in avoidance that from insanity, drunkenness, and the like he was incapable of exercising judgment, understanding the proposed engagement, and of knowing what he was about when he entered into the contract sought to be avoided. It is plain that the rule given in charge to the jury by the trial court in this case is a radical departure from the established and true rule obtaining in all such cases. One may well be unable, from intoxication, to give 'proper attention' to a transaction, and yet know what the transaction involves, and be capable of understanding the terms and effect of a contract issuing out of it, so as to be as fully bound by it as if he was under no degree of intoxication. The charge given at defendant's request should therefore have been refused.

The instruction given by the court *ex mero motu* is even more patently erroneous. Many perfectly sane and sober men could not bind themselves by contract at all, if the rule laid down there is a sound one. The law does not gauge contractual competency by the standard of mental capacity possessed by reasonably prudent men. A man is not incapacitated because of intellectual limitations arising from intoxication or what not, which prevent him from giving to a proposed contract all the consideration that a reasonably prudent man would be able to give it. Indeed, that test has no relation to mental capacity. Competency to contract may well exist in as high a degree in a reckless, careless man as in one of the highest prudence and care, and the inability of the former to give a certain degree of attention to a business matter results, not from mental incapacity to know and understand the matter in hand, but from the indifference as to it, or his habit or disposition to drunkenness. And one may sufficiently understand a contract, and the nature and effect of his entering into it, to be fully bound by it, though he be capable of only a very much less consideration of it than would be bestowed by a man of ordinary prudence. The cases of Hale v. Brown, 11 Ala. 87, and Holland v. Barnes, 53 Ala. 88, relied upon for appellee, involved other considerations than the drunkenness of the party seeking to avoid a contract,—overreaching by the other party, unfair and unconscionable contracts, etc.,—and they have no application to the present case. Reversed and remanded."

RIGHTS OF ABUTTING OWNERS AS AGAINST TELEPHONE AND TELEGRAPH COMPANIES.

The introduction of the electric telephone and telegraph evoked many new questions of the law of real property. The general demand for a method of rapid intercommunication in the business and social world lead to the widespread dissemination of such lines, and, with general and increasing construction, the erection of poles and the placing of wires, caused, in a measure at least, some detriment to the fee of the adjoining landholder. Upon many of the questions that have thus

arisen the courts have held widely divergent views, but the general tendency of decision has been to afford companies constructing and operating telephone and telegraph lines as wide a latitude in their operations as is consistent with a proper interpretation of the laws governing real property. That telephone and telegraph lines may be, for all general purposes of the law, considered one and the same, there can be no longer any question. Stephens, J., says:[1] "I do not think it necessary to express any opinion on a controversy which is more scientific than legal, and perhaps more properly metaphysical or relative to the meaning of words than scientific, as it seems to turn upon the nature of identity in relation to sound. It is enough to say that whatever be the merits of the controversy, it does not appear to us that the fact, if it is a fact, that sound itself is transmitted by the telephone, establishes any material distinction between telephonic and telegraphic communication, as the transmission of it takes place and is performed by a wire acted on by electricity." And Brown, J., says:[2] "We see no reason to doubt the position assumed by the complainant that a telephone company is a telegraph company." This ruling seems to have been generally accepted and widely followed.[3]

Primary amongst the questions that has been raised by the abutting landowner is that concerning the subordination of the highway to the use of telephone and telegraph circuits. Is the erection and maintenance of such a line a use to which the highway may properly be subjected? or are the poles and wires a novel and improper use, foreign to the purpose for which the easement was acquired, and a new and additional burden upon the fee? Here the courts are at issue, and the opinions, each logical and of weight, widely divergent. Devens, J., says:[4] "The use of a portion of the highway for the public use of companies organized under the laws of the State for the transmission of intelligence by electricity, and subject to the supervision of the local municipal authorities, which has been permitted by the legislature, is a public use similar to that for which the highway was originally taken and to which it was originally devoted." The argument in this line of decisions would seem to be that the public streets are not limited in their use to the purpose of passways, or avenues for travel, but may be subjected to every use which promotes public convenience and comfort and is not inconsistent with the use to which they were originally dedicated.[5] It is further argued in those cases where this view has been taken, that the occupation of the streets by poles and wires takes nothing which the laws reserved to the original proprietor of the land, when the public easement therein was acquired, nor does it appropriate it to a use not within the public easement.[6] That where land has once been duly appropriated to a public use, which requires the occupation of its whole surface, and is applied by legislative authority to another and similar use, no new claims for compensation unless expressly provided for can be sustained by the holder of the fee;[7] and so the erection of telephone poles and wires upon the public highway, in States where these views are held, does not impose upon the land a novel and additional servitude entitling the holder of the fee to additional compensation therefor.[8]

The contrary view is ably expressed in the opinion of Allen, J., in what may be termed one of the leading cases upon this subject, Pierce v. Drew.[9] Here the learned judge, dissenting from the view of the majority of the court, says: "If it is incident to the laying out of a highway that a telegraph line may thereafter be established upon it, by the

[1] Atty.-Gen. v. Edison Tel. Co., 6 Q. B. Div. 244.

[2] Cumb. Tel. & Tel. Co. v. United Elect. Ry., 42 Fed. Rep. 273.

[3] Duke v. Telephone Co., 53 N. J. Law, 341; Wisconsin Tel. Co. v. Oshkosh, 62 Wis. 32; Chesapeake & Potomac Tel. Co. v. B. & O. Tel. Co., 66 Ind. 410.

[4] Pierce v. Drew, 136 Mass. 75.

[5] Halsey v. R. T. St. Ry. Co., 20 Atl. Rep. 859; Guy v. Mutual Union Tel. Co., 12 Mo. App. 485; Julia Bldg. Assn. v. Bell Tel. Co., 18 Mo. App. 477; Hewett v. W. U. Tel. Co. (D. C.), 54 Am. Rep. 284; R. R. Co. v. Newark, 10 N. J. Eq. 352.

[6] Magee v. Overshimer, 150 Ind. 127; Taggert v. Ry. Co., 19 Atl. Rep. 326; Williams v. Ry. Co., 41 Fed. Rep. 556.

[7] Atty.-Gen. v. Met. R. R., 125 Mass. 515; Boston v. Richardson, 13 Allen, 146.

[8] Carter v. N. W. Tel. Ex. Co. (Minn.), 40 Cent. L. J. 475; Young v. Yarmouth, 9 Gray, 386; Chase v. Sutton Mfg. Co., 4 Cush. 167; Hewett v. Tel. Co., 4 Mackay, 424.

[9] 136 Mass. 75.

sanction of a future board of municipal officers, this right must of necessity be paid for at the outset, unless the owner of the land will have a subsequent claim for additional damages; otherwise his property is taken from him without compensation. It is going quite too far to hold that in law it must be deemed to have been within the contemplation of the parties at the time of the laying out of the highway that it might be used for such new and additional purposes. They are in their nature essentially distinct from the ordinary use of the highway by travelers. It is not desirable to impose this new and additional burden upon the laying out of highways. If the public convenience and necessity require a new highway, but do not require a line of telegraph over it, the public authorities ought to be able to take such an easement as will subserve the public requirement without being subjected to the necessity of paying for a right which is not needed nor desired. The use of a highway for telegraphic purposes is not naturally included in the original design, nor naturally incidental to its use for travel. Highways can be and are conveniently used without telegraphs or telephones. The latter can be established without the use of the highway. It may be convenient in many instances to use the highway for electrical lines. Whenever this proves to be the case, there is no hardship in requiring those who wish to establish such lines to pay for the privilege such damages, if any, as may be caused to the owners of the property by such use."

Where this view is taken, the argument would seem to be that the power of the legislature over the streets is confined strictly to the use for which they were taken; that as trustee no greater title is taken than is necessary to the proper execution of the trust, and that, as the construction and maintenance of telephone and telegraph lines upon the highway do not come within the terms of a trust confined strictly to the protection of the public easement in the streets, a legislative franchise to companies, organized for the transmission of intelligence by electricity, permitting such construction, is void and inoperative as against abutting owners.[10] It is held that the erection of poles and wires, under legislative sanction, without the consent of the adjacent owner, who retains the fee in the highway, comes within the constitutional inhibition, "private property shall not be taken or damaged without just compensation."[11] Condemnation of land for the public use as a highway gives, it is argued, only the right of passage over it. The absolute property therein remains in the holder of the fee, and this is restricted and interfered with by the erection of poles and wires in or upon the land. The State does not possess this right, as trustee for the easement; it cannot, constitutionally, grant it to another.[12] A franchise to erect a telephone or telegraph line upon the public highway, in such a manner as not to incommode the public in its use, may be granted, but such lines form no part of the equipment of a public street, but are foreign to its use, and where the abutting owner holds the fee to the middle of the street he is entitled to extra compensation for the additional burden placed upon his land.[13] In short, a telegraph or telephone company is regarded as a public use only in the sense that the public, by payment therefor, may become possessed of certain rights which the law will enforce. The true question at issue is, whether or not the erection of poles and wires upon the highway constitute an additional servitude upon the fee and so entitle the landowner to extra compensation therefor. There can, properly speaking, be no distinction between cases where the fee to the middle of the street is in the abutting owner, and those where it is in the public.[14] It is impossible to lay down any exact rule as to the circumstances that will justify the exercise of the power of eminent domain as against abutting landowners, or the holder of the fee in general.[15]

[10] Met. Tel. & Tel. Co. v. Colwell Lead Co., 67 How. Pr. 365.

[11] Board of Trade Tel. Co. v. Barnett, 107 Ill. 507.

[12] W. U. Te . Co. v. Williams, 86 Va. 696.

[13] Hudson River Tel. Co. v. Watervliet T & R. R. Co., 135 N. Y. 393; Cin. & I. P. R. R. Co. v. City & Sub. Tel. Assn., 48 Ohio St. 390; Dailey v. State (Ohio), 37 N. E. Rep. 710; State v. Newark, 37 N. J. L. 415; Weller v. McCormick, 47 N. J. L. 397; Broome v. Tel. Co., 42 N. J. Eq. 141; Dusenburg v. Tel. Co., 11 Abb. N. C. 440; Stowers v. Postal Tel. Cable Co., 33 Cent. L. J. 258; A. & P. Tel. Co. v. C., R. I. & P. R. R. Co., 6 Biss. 158.

[14] Randolph on Em. Dom. Pars. 415, 416; McQuaid v. P. & V. Ry. Co., 18 Oreg. 237.

[15] Olmstead v. Camp, 33 Conn. 531.

For the purposes of this article we can merely examine the general principles. The use must be public, but it is not necessary that the public of an entire community be benefited by the use; a local use is undoubtedly sufficiently public.[16] So the condemnation of a right of way for a telephone company, whose operations were to be purely local, would be a proper exercise of the power of eminent domain, since public use and public benefit or utility are, in this connection, synonymous.[17] It is essential, however, that the user or right of user be in the public, and that this be the improvement for which the private property is taken, consequently it is necessary that the service of telephone or telegraph companies, seeking to acquire right of way for the erection of poles and wires, be available to the public of the locality in which the right of eminent domain is sought to be exercised, or at least available to the public in general.[18] The fact that the property of the individual so taken is bestowed upon a private person or corporation, and that private emolument and gain results from the use, will not prevent the exercise of the power in the case of telephone and telegraph companies as against abutting owners, since the use is public and public benefit the object in view.[19] There can, consequently, be no doubt that a telephone or telegraph line for the general transmission of messages is a use, on behalf of which the power of eminent domain may be properly exercised.[20] It has been held, in a recent Texas decision,[21] that a telephone company, organized under a statute providing for "a telegraph and telephone line" which formerly read "a telegraph or telephone" line, is entitled to exercise the power of eminent domain under a statute giving such power to corporations created for the purpose of constructing and maintaining "a magnetic telegraph line."

As to the right of the adjacent owner to compensation for the obstruction of light, air, etc., by telephone and telegraph companies, there can be no question. The abutting owner has redress as against any substantial obstruction of his right of access, or his enjoyment of the use of the street in connection with his land.[22] The right to maintain shade or ornamental trees in front of property is clearly incidental to the ownership of the adjacent fee. In Ohio, where it is held that no additional servitude is imposed upon the land constituting highways, by the erection and maintenance of the poles and wires of telephone and telegraph companies, such a company was held to have no right to trim trees, whether such cutting was necessary or not.[23] In Connecticut, where the statute permitting the construction of telephone lines says that trees shall not be injured without the consent of the owner, it has been held selectmen cannot give authority to cut trees, even though such cutting be necessary, without the consent of the adjacent landowner.[24] In Mississippi a telegraph company, constructing under a permit from a county board of supervisors, acting under power conveyed by statute, was held to have acquired no power to remove trees or branches.[25] Where the abutting owner holds the fee to the middle of the street, and the courts view the erection of telephone and telegraph poles and wires as a new servitude upon the fee, it would seem that the trimming of trees and hedges entitles the abutting owner to compensation, if done without an express license from him.[26] On the other hand, even though the adjoining owner so holds the fee, if the poles and wires be con-

[16] Pom. note Sedgwick, Const. of State and Const. law (2 Ed), 446; Township Board v. Hackman, 48 Mo. 243; Williams v. School Dist., 33 Vt. 271; Hartwell v. Armstrong, 19 Barb. 166; Coster v. Tidewater Co., 18 N. J. Eq. 54; Talbot v. Hudson, 16 Gray, 417.

[17] Salt Co. v. Brown, 7 W. Va. 191; Todd v. Austin, 34 Conn. 78; Dayton Mining Co. v. Seawell, 11 Nev. 191; Bradley v. N. J. etc. R. R. Co., 21 Ind. 294; Great Falls Mfg. Co v. Fernald, 47 N. H. 456; Hand Gold Mining Co. v. Parker, 59 Ga. 418.

[18] Petition of Mt. Washington Road Co., 35 N. H. 134; Jordan v. Woodward, 40 Me. 317; O'Reilly v. Kankakee Valley Co., 32 Ind. 169; Lance's Appeal, 55 Pa. St. 16.

[19] Anderson v. Tubeville, 6 Cold. 150; Swain v. Williams, 2 Mich. 427; Harris v. Thompson, 9 Barb. 350; Matter of Townsend, 39 N. Y. 171; Concord R. R. v. Greely, 17 N. H. 47.

[20] New Orleans R. R. Co. v. Southern Tel. Co., 53 Ala. 211.

[21] San Antonio & H. P. R. R. Co. v. S. W. Tel. & Tel. Co., 49 L. R. A. 459.

[22] Zebren v. Milw. Elect. Ry. & Light Co., (Wis.), 74 N. W. Rep. 538; Jaynes v. Omaha St. Ry. Co., 53 Neb. 631.

[23] Daily v. Ohio, 51 Ohio St. 348.

[24] Bradley v. South. New Eng. Telep. Co., 66 Conn. 559.

[25] Clay v. Postal Teleg. & Cable Co., 70 Miss. 406.

[26] Board of Trade Teleg. Co. v. Barnett, 107 Ill. 507.

sidered no new burden upon the highway, and a use not foreign to the public easement therein, then a municipality granting a franchise to a telephone company, when acting under its powers to provide for public uses, grants therewith the power to do the necessary trimming of trees and hedges adjacent to such line,[27] a similar view being taken by the federal court.[28] Where the cutting is unnecessary or malicious, or where the trees are wantonly injured, as by the careless use of linemen's "climbers," the company is liable, certainly for the damage actually sustained, and, in certain cases, even punitive damages may be obtained.[29] This would seem to be the rule, even though the cutting by the company's agents be in direct violation of its expressed orders.[30] As to the restrictions placed upon the adjoining owner, in his use of the fee, by reason of the proximity of telephone or telegraph circuits upon the adjacent highways, there are none save those to which he is subjected generally. The maxim of the law, "*Sic utere tuo ut alienas non laedere*," applies equally well in the cases of companies for the transmission of intelligence by electricity against abutting owners. The feeholder can maintain upon his land anything to which he may, at common law, subject the fee, and he is liable only when he does not make "use of the means which the progress of science and improvement have shown to be the best" to prevent injury to another.[31] Kekewich, J., says[32]: "I cannot see my way to hold that a man who has * * * called into special existence an electric current for his own purposes, and who discharged it into the earth beyond his control, is not as responsible for damages as he would have been if he discharged a stream of water. * * * I hold that if it finds its way onto his neighbor's land and then damages the neighbor, the latter has a cause of action."

The court, in the case of the Hudson River Tel. Co. v. Watervliet Turnpike & Railroad Co.,[33] says: "We are not prepared to hold that a person, even in the prosecution of a lawful trade or business upon his own land, can gather there by artificial means a natural element, like electricity, and discharge it in such volume that, owing to the conductive properties of the earth, it will be conveyed upon the grounds of his neighbor with such force and to such an extent as to break up his business or impair the value of his property, and not be held responsible for the resulting injury. * * * It cannot be questioned that one has a right to accumulate water on his own real property and use it for a motive power, but he cannot discharge it there in such quantities that, by the action of physical forces, it will inundate his neighbor's land and destroy his property, and shield himself from liability on the plea that it was not his act, but an inexorable law of nature that caused the damage. * * * If he collects for pleasure or profit the subtle and imperceptible electric fluid, there would seem to be no hardship in imposing upon him the same duty which is exacted of the owner of the accumulated water power—that of providing an artificial conduit for the artificial product, if necessary to prevent injury to others."

So the erection and maintenance of plants generating or using electricity and employing a grounded return circuit to the detriment of telephone or telegraph lines upon the adjacent highway, renders the owners of such plants liable for all damages that may ensue from such interference, provided that, at a reasonable expense, by the adoption of proper and known appliances, the injury could have been avoided. There is no obligation to utilize devices that are in the nature of experimentation, but if proper means be generally known by which the escapement and consequent conduction may be prevented, the person generating or employing electricity fails to use them at his peril. There can properly be no distinction between the telephone company which, as a rule, from the nature of its business, is compelled

[27] Southern Bell Telep. Co. v. Francis & Allen, 109 Ala. 224.

[28] Southern Bell Telep. Co v. Constantine. (Ala), 61 Fed. Rep. 61.

[29] Tissot v. Southern Tel. & Tel. Co , 39 La. Ann. 996.

[30] Graham v. Chester Elect. Co., 39 N. Y. Supp. 125; Hoyt v. Southern New Eng. Telp. Co., 60 Conn. 385; Poston v. Cumb. Tel. & Tel. Co. 94 Tenn. 696; Postal Teleg. & Cable Co. v. Lenoir, 107 Ala. 640; Postal Teleg. & Cable Co. v. Brantley, 107 Ala. 683.

[31] Cumb. Tel. & Tel. Co. v. United Elect. Ry. Co., 42 Fed. Rep. 279.

[32] National Tel. Co. v. Baker, 2 Chancery (1893), 201.

[33] 135 N. Y. 393.

to make provision for its return circuit, and the person using an electrical current for purposes that do not require such provision.[34]

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Chicago, Ill.

[34] Cumb. Tel. &. Tel. Co. v. United Elect. Co., 93 Tenn. 492.

REPLEVIN — FRAUDULENT PURCHASER— POSSESSION.

SINNOTT v. FEIOCK.

Court of Appeals of New York, February 1, 1901.

Replevin will not lie against a fraudulent purchaser of goods when they have been taken from him by process which is legal as to him, and not by any voluntary act on his part, since the action is one to recover possession of chattels, as distinguished from an action for conversion.

CULLEN, J.: The action is in replevin to recover certain chattels which, it was alleged, the plaintiff was induced to sell to the respondent by fraud, on the part of the latter. The complaint was in the ordinary form, and averred property in the plaintiff, and that the defendant wrongfully took and detained the chattels. The complaint was dismissed on the opening of the plaintiff's counsel, and his concession (apparently made for the purpose of obtaining a ruling on the question) that prior to a demand for the return of the goods, and before the commencement of the action, the chattels had been taken from the defendant on an execution against him and sold, so that at the time of such demand and commencement of the action they were not in the defendant's possession, custody, or control. On this concession the trial court dismissed the complaint, and the judgment entered on such dismissal has been affirmed by the appellate division.

There was no suggestion made that the defendant obtained the property with the intention that it should be seized on execution, or in pursuance of any conspiracy or collusion with the execution creditor. The sale was not void, but voidable at the election of the plaintiff. At the time the chattels were seized on execution the plaintiff had not rescinded the sale, and, whatever were the plaintiff's rights, the seizure of the goods as to the defendant was lawful, and he could not resist or avoid it. The question presented, therefore, is whether the defendant is liable in an action of replevin for the recovery of the chattels after they have been taken from him by process legal as to him, and not by any voluntary act on his part. The determination of this question requires an examination and consideration of this particular form of action as it now exists under our code and statutes.

Originally, at common law, the action of replevin lay to recover the possession of goods illegally distrained by a landlord. The primary object of the action was to recover possession of the specific chattels. The form of action was so useful that the action was extended to nearly all cases of unlawful caption or detention of chattels, where it was sought to recover the chattels in specie. In many cases where the plaintiff was unable to obtain the return of the chattels he could recover in the action their value. Still the action remained essentially one to recover the possession of chattels, as distinguished from actions in trespass or trover to recover damages for the seizure or for the value of the property. There were many technical rules in force relating to this form of action, which at times made proceedings under it difficult, and in 1788 a statute was passed in this State (1 Rev. Laws, 1813, p. 91) to simplify the procedure. It directed the form of plaint before the sheriff, in which the plea was "of taking and and unjustly detaining" beasts, goods, or chattels. Afterwards the Revised Statutes prescribed the rules governing actions of replevin, and the procedure therein. Title 12, ch. 8, pt. 3. In the original note of the revisers is stated their intention to so extend the action of replevin "as to make it a substitute for detinue, and a concurrent remedy in all cases of the unlawful caption or detention of personal property, with trespass and trover." We do not think the revisers used the term "concurrent" as meaning "co-extensive," for by section 6, title 12, it is provided that the action shall in all cases be commenced by writ, the form of which is prescribed as follows: "Whereas A B complains that C D has taken, and does unjustly detain (or 'does unjustly detain,' as the case may be)." The execution in the action required the sheriff to replevin the goods if they could be found, and deliver them to the plaintiff, and, in case they could not be obtained, to collect their value, with the damages and costs, from the property of the defendant. The provisions of chapter 2 of title 7 of the Code of Procedure of 1848, entitled "Claim and Delivery of Personal Property," operated as a substitute for those of the Revised Statutes. They direct that at the commencement of the action the plaintiff may replevy the chattels, but in the affidavit to obtain the writ there is required the statement that the defendant "unjustly detains" them. The provisions of the present Code of Civil Procedure, in the article entitled "Action to Recover a Chattel" (sections 1689–1730), are substantially the same as those of the old code.

The question several times arose under the Code of Procedure whether replevin could be maintained against a party who was not in possession, either actual or constructive, of the chattels, and was the subject of conflicting decisions in the supreme court and in the superior court of New York. It finally came to this court, in Nichols v. Michael, 23 N. Y. 264. This was also a case of fraudulent purchase of goods, in which the defendant, before the action was brought,

had voluntarily transferred the goods to his assignee. It was held that the action could be maintained. This decision was based on the authority of two English cases: Garth v. Howard, 5 Car. & P. 346, and Jones v. Dowle, 9 Mees. & W. 19. In the case in this court Judge Selden wrote: "The theory upon which these cases proceed is perfectly sound, and applies directly to the present case. It is that where a person is in possession of goods belonging to another, which he is bound to deliver upon demand, if he, without authority from the owner, parts with that possession to one who refuses to deliver them, he is responsible in detinue equally with the party refusing. He contributes to the detention. It is the consequence of his own wrongful delivery. The action in such cases may properly be brought against both, because the acts of both unite in producing the detention." This doctrine has been steadily adhered to by this court. Barnett v. Selling, 70 N. Y. 492; Dunham v. Troy Railroad Co., *42 N. Y. 543. These decisions, however, do not control the present case. They are authorities to the effect that where the defendant has wrongfully parted with possession the action will lie. As already stated, the defendant did not part with possession by any act on his part, but the property was taken from him by process of law valid as to him, and which he could not resist. To uphold a recovery in replevin under such circumstances we must go further, and decide that whenever property has been taken or obtained wrongfully an action of replevin may be maintained against the taker, regardless of whether the property is in his possession or whether he has been lawfully deprived of it, and as a logical sequence, as we think, also regardless of the fact that the property sought to be replevied may have ceased to exist without fault on the defendant's part; in other words, that the action can be maintained under all circumstances to the same extent as an action for conversion. Such a doctrine would substatially destroy the characteristics of an action of replevin, which distinguish it as an action to recover possession of specific property, and we find no authority for it in the decisions of this or of our sister States. In Massachusetts the rule seems absolute that the defendant must be in possession when the action of replevin is brought. Richardson v. Reed, 4 Gray, 441; Hall v. White, 106 Mass. 599. In the earlier case it is said: "By the common law replevin cannot be maintained where trespass cannot, for by that law an unlawful taking of goods is a prerequisite to the maintenance of replevin. But trespass will lie in cases where replevin will not. Replevin, being an action in which the process is partly *in rem*, will not lie where it is impracticable or unlawful to execute that part of the process according to the precept." In the later case it was held that the action would not lie against a sheriff who had seized goods, but parted with possession before the date of the plaintiff's writ. The same rule obtains in New Hampshire (Mitchell v. Roberts, 50 N. H. 486), Iowa (Coffin v. Gephart, 18 Iowa 256), Missouri (Feder v. Abrahams, 28 Mo. App. 454; Davis v. Randolph, 3 Mo. App. 454), Maine (Howe v. Shaw, 56 Me. 291), Minnesota (Ames v. Boom Co., 8 Minn. 467), and in North Carolina (Haughton v. Newberry, 69 N. Car. 456). In Michigan the statute as to procedure in replevin is similar to our own; and in McBrian v. Morrison, 55 Mich. 351, 21 N.W. Rep. 368, the supreme court of that State, following the rule in Nichols v. Michael, *supra*, held that the action lay, despite a wrongful transfer by the defendant prior to its institution. In the subsequent case of Gildas v. Crosby, 61 Mich. 413, 28 N. W. Rep. 153, it is said: "The nature of the remedy—the detention being the gist of the action, and the delivery of the goods its object—forbids this action against one not in possession, and who cannot deliver the property, unless he has concealed, removed, or disposed of the same with the intent of avoiding the writ." Accordingly it was held that replevin would not lie against a pledgee who had improperly sold the pledge and parted with possession. With us it is sufficient that the defendant has voluntarily disposed of the property, though without intent to avoid the writ. Barnett v. Selling, *supra*. In Wisconsin, though a decision on the exact point seems wanting, the *dicta* of the opinions indicate the rule to be the same as that in this State. In Virginia there is a very early case on the subject (Burnley v. Lambert, 1 Wash. 308), argued by Mr. (afterwards justice) Washington and Mr. (afterwards chief justice) Marshall. It was there held that the defendant could not, by transferring the property before the commencement of the action, defeat the writ. In the opinion it is said that "possession of the defendant prior to the suit was sufficient to charge him unless he was legally evicted." In Pool v. Adkisson, 1 Dana, 110, the Court of Appeals of Kentucky, following the decisions in Burnley v. Lambert, held that the voluntary transfer of the defendant before suit did not defeat an action in replevin. It is there said: "According to the case of Burnley v. Lambert, the fact that the plaintiff was not possessed of the slaves when this suit was brought cannot change or affect the remedy, unless he had been 'legally evicted.' This doctrine, if interpreted literally, may be too restrictive. But it seems to be free from just exception, if understood, as we suppose it ought to be, to mean that the plaintiff had been devested of the possession in a manner authorized by law, and which, would therefore, exonerate him from the charge of tortious conduct." It was held by the same court in Caldwell v. Fenwick, 2 Dana, 333, that detinue could not be maintained for a slave dead before the commencement of the action, though otherwise if he had died subsequent to the commencement of the action, or the defendant had improperly parted with his possession. The court said: "Detinue is a mode of action given for the

recovery of a specific thing, and damages for its detention, though judgment is also rendered in favor of the plaintiff for the alternate value, provided the thing cannot be had; yet the recovery of the thing itself is the main object and inducement to the allowance of the action. * * * The action is not adapted to the recovery alone of the value of a thing detained, nor can it be maintained therefor."

We have thus reviewed the leading cases in this country in reference to the circumstances under which an action of replevin can be maintained. None of them authorizes the maintenance of the action under the circumstances of the present case. In all of them replevin is held to be essentially a possessory action. In many of the States it is unqualifiedly requisite for the maintenance of the action that the defendant should be in possession of the chattels sued for at the time the action was commenced. In others, as in our own State, an exception is made to the general rule where the defendant has voluntarily parted with the property. Still the exception goes only to the extent stated. The law in Virginia and Kentucky is substantially the same as our own, and the cases cited from those States are well reasoned on principle. The case at bar falls within the rule stated in those cases—that, where the defendant is evicted by legal process before suit brought, the action will not lie—and we are therefore of opinion the disposition of the case by the courts below was correct. We have not overlooked the decision in Devoe v. Brandt, 53 N. Y. 462. In that case Samuels, the vendee, from whom the goods had been taken on execution, did not defend the action, and the question we have discussed did not arise. The action was unquestionably well brought against the other defendant, as he was in possession of the chattels at the time of the commencement of the suit.

It is urged that, whatever may have been originally the nature and character of an action of replevin, there is now no longer reason for maintaining a distinction between it and an action for conversion, and that it would conduce greatly to the speedy administration of justice to permit the use of the first form of action as a substitute for the second. A good deal may be said in favor of this claim, great as would be the innovation resulting in its acceptance. There is, however, a serious objection to adopting this view of an action of replevin. If a defendant is arrested in an action to recover a chattel, he can be discharged only upon giving a bond for the return of the chattel, or the full payment of any judgment that may be recovered against him, while in an action for conversion the bond is conditioned only for his personal surrender to any mandate or final judgment against him. Code Civ. Proc. § 575. The form of the action, therefore, seriously affects the rights of the defendant against whom it is brought. While this consideration should not induce us to limit the scope of an action of replevin except within the bounds prescribed by statute and the authorities, it may well restrain us from taking any radical departure in the law. The judgment appealed from should be affirmed, with costs.

Parker, C. J., and Gray, Bartlett, Martin, Vann, and Werner, JJ., concur.

Judgment affirmed.

NOTE.—*Recent Decisions on Questions of Ownership and Right of Possession in Action of Replevin.*—Where mortgagors of a lot remove a house from it after sale of the lot on foreclosure of the mortgage, replevin by the purchaser to recover the house will not lie before the period of redemption has expired and he is entitled to possession. People's Sav. Bank v. Jones, 114 Cal. 422, 46 Pac. Rep. 278. A mortgagee in possession is the owner of the personal property described in the mortgage, for the purposes of an action of replevin therefor, against an officer who takes the property under an attachment against the mortgagor. Williams v. Miller (Kan. App.), 49 Pac. Rep. 703. A person in possession of a chattel mortgage and the notes secured thereby, who has renewed the mortgage, collected a large portion of said notes, and taken possession of the mortgaged property under the mortgage, will be held to be the owner thereof for the purpose of recovering the mortgaged property from an officer who attaches it as the property of the mortgagor. Williams v. Miller (Kan. App.), 49 Pac. Rep. 703. Where plaintiff shows possession under claim of purchase, and forcible taking, defendant cannot impeach his title. Conely v. Dudley (Mich.), 69 N. W. Rep. 151. In view of the language of Code Civ. Proc. secs. 191, 192, prescribing the form of verdict and judgment in replevin, the question in such an action is the right to possession at the commencement of the action, and not at the trial. Brown v. Hogan, 49 Neb. 746, 69 N. W. Rep. 100. Where notes are placed with a third party to be delivered when the maker directs, replevin therefor by the payee will not lie where the maker directs that they shall not be delivered. Nichols & Shepard Co. v. First Nat. Bank (N. Dak.), 71 N. W. Rep. 135. In replevin by a wife to recover wheat grown by her and levied on by the sheriff for the husband's debts, it is immaterial whether the lease from the husband, under which the wife held and cultivated the land on which the wheat was grown, was valid or not. Burchett v. Hamill (Okla.), 47 Pac. Rep. 1053. The maker of notes is not the owner or entitled to possession thereof unless the same have been paid or canceled by a court, so as to maintain replevin for recovery of the possession. Olson v. Thompson (Okla.), 48 Pac. Rep. 184. A licensee under an unrevoked license to cut and remove timber, for which privilege he has paid full value, has title sufficient to maintain replevin for the timber after it has been cut and removed by a mere trespasser. Keystone Lumber Co. v. Kolman (Wis.), 69 N. W. Rep. 165, 34 L. R. A. 821. A mortgagee of chattels to which the mortgagor had no title is liable to the real owner where he sells the chattels under the mortgage and delivers them to the purchaser after notice of the owner's claim, and it is no defense that he parted with the possession or control of the chattels before the action against him was commenced. Tasker v. Ryan, 49 N. Y. S. 942, 4 App. Div. 616. To sustain replevin, plaintiff must be entitled to the immediate and exclusive possession of the property, but a prior actual possession thereof is not essential. Garcia v. Gunn, 119 Cal. 315, 51 Pac.

Rep. 684. A lease of an island, giving control over all wild goats found thereon, with power to kill them in moderate numbers, gives a right to immediate possession of all of the goats, so that the lessee may maintain replevin against a trespasser who kills some of the animals and takes away their hides, and is not relegated to an action of trespass. Garcia v. Gunn, 119 Cal. 315, 51 Pac. Rep. 684. To maintain replevin, the plaintiff must have the right of possession, as well as the right of property. Gazelle v. Doty, 78 Ill. App. 406. Replevin will not lie by one claiming under an instrument not filed, in the nature of a security obligation against a pledgee who had no notice of the instrument, and who has not waived his lien, nor against one accountable to the pledgee for possession. Farr v. Kilgour (Mich.), 75 N. W. Rep. 457. A wife cannot recover, in replevin, bonds purchased by her husband with funds which came from plaintiff's father, as she had no legal title, and was not entitled to immediate possession. Leete v. State Bank of St. Louis (Mo.), 42 S. W. Rep. 927. One in possession of hogs bought by him at an agreed price per pound, who is taking them to the scales to weigh, so as to ascertain the amount due, has sufficient possession to maintain replevin for their wrongful taking, although he has not paid any purchase money. Wren v. Kuhler, 68 Mo. App. 680. If any attorney in fact is entitled to the possession of goods at the time suit is brought he is entitled to bring replevin. Nichol v. Abram, 20 Pa. Co. Ct. Rep. 605, 7 Pa. Dist. Rep. 250. Judgment should not be entered against defendants in replevin, who are not shown to have been in possession of, or exercising control over, the property when it was replevied. Eales v. Francis (Mich.), 79 N. W. Rep. 894. The owner of property attached as belonging to another may maintain replevin therefor, although, on his demanding the property, the levying officer stated that he might have it if it was his, where the officer retained the same possession of the property after such statement as he had before. Wheeler v. Eaton (N. H.), 39 Atl. Rep. 901. The gist of replevin is unlawful possession of the property. Where, therefore, defendant has disposed of the property, and is no longer in its possession, the proper remedy is not replevin, but an action for unlawful conversion. Simper v. Bentley, 15 Ohio Cir. Ct. Rep. 515, 8 Ohio Dec. 356. Where defendant either delivered cows to plaintiff at the time of trading them to him, and never afterwards was in possession of them, or only agreed to deliver them, but did not, replevin will not lie therefor, though in the latter case defendant would be liable in an action for breach of his contract. Hodges v. Nall (Ark.), 49 S. W. Rep. 352. Though there is an apparent breach of the condition as to payment in a mortgage given to secure the price of chattels, the mortgagor is not thereby devested of the legal title, so as to be precluded from maintaining replevin against the mortgagee, who has seized the goods for non-payment, where the amount unpaid is withheld as, and is at least equal to, the damages caused by the mortgagee's breach of warranty. Hennessey v. Barnett (Colo. App.), 55 Pac. Rep. 197. Where a father agreed to give his emancipated son a certain horse, if he would do certain work, the son has title allowing recovery by him of the horse, though the father dies before actual delivery of it, if, under the agreement, the father relinquished all his right to him; not so if the contract was merely executory. Wilkins v. Wilson (Del.), 41 Atl. Rep. 76, 1 Marv. 404. Plaintiff in replevin must recover on his own title, not defendant's lack of title. Wilkins v. Wilson (Del.), 41 Atl. Rep. 76, 1 Marv. 404. Replevin does not lie to recover property not in defendant's possession at the time of bringing the suit. Myrick v. National Cash Register Co. (Miss.), 25 South. Rep. 155. Where mortgaged wheat was delivered to an elevator, and general storage tickets issued therefor, permitting the owner to demand wheat of the same quantity and quality as that delivered to the elevator, but not to demand the identical wheat delivered, an assignee of the storage tickets has no such possession of the mortgaged wheat as will entitle the mortgagee to maintain replevin against him. Best v. Muir (N. Dak.), 77 N. W. Rep. 95. Claim and deliver can be maintained for only such property as was in the actual or constructive possession of defendant when the action was begun. McCormick Harvesting Machine Co. v. Woulph (S. Dak.), 76 N. W. Rep. 939. To maintain replevin for goods, the plaintiff must not only have title, but must be entitled to immediate possession thereof. Carpenter v. Glass, 67 Ark. 135, 53 S. W. Rep. 678. Where plaintiff in replevin is entitled to the possession of the chattels at the time of trial, a return to defendant will not be ordered though plaintiff was not entitled to such possession when the action was commenced. Flinn v. Ferry, 127 Cal. 648, 60 Pac. Rep. 434. A [chattel mortgagee may maintain replevin for the chattels where the mortgage gives him a right of possession. Flinn v. Ferry, 127 Cal. 648, 60 Pac. Rep. 434. Fixtures severed from realty by a mortgagor in possession before foreclosure, and afterwards sold to one who bought with constructive notice of the mortgagee, but otherwise in good faith and for value, cannot be recovered by the mortgagee from such purchaser in an action of replevin. McKelvey v. Greevey, 72 Conn. 464, 45 Atl. Rep. 4. Where a chattel mortgagee authorized another to sell the property and received the purchase money, and the person authorized sold the same, forged a release of the mortgage, and received and embezzled the consideration, the mortgagee could not replevin the property, since the right of possession, in addition to a mere legal title is essential to replevin, and such right was in the purchaser. Dentzel v. City & Suburban Ry. Co., 90 Md. 434, 45 Atl. Rep. 201. The bailee of property holding possession for the rightful owner, they maintain replevin therefor. Pallen v. Bogy, 78 Mo. App. 88, 2 Mo. App. Rep. 232. A plaintiff in replevin must recover, if at all, on the strength of his own title or right of possession. Herman v. Kneipp, 59 Neb. 208, 80 N. W. Rep. 816.

CORRESPONDENCE.

AN OHIO PRECEDENT REVERSED ON REHEARING.

To the Editor of the Central Law Journal:

In your issue of March 1st, vol. 52, No. 9, I notice a comment on page 162, upon a recent Ohio case, City of Zanesville v. Zanesville Telephone Co. It will probably be of interest to you to learn that this case was reheard by the supreme court in January of this year and reversed. The opinion which you publish is the first one delivered, and of course is not the law in Ohio. You will find in the February issue of this law journal, on page 19, a somewhat lengthy comment upon the case. The second decision has not as yet been published in full, although you will find the syllabus in the Ohio Weekly Bulletin, vol. 45, page 59. Trusting that this information may be of value to you, I am,

Yours respectfully,

Cleveland, Ohio. FRANK M. COBB.

BOOK REVIEWS.

BIGELOW ON TORTS.

This is the seventh edition of a book which has been very universally used by the profession for many years. But little can be said of its merits that the practicing lawyer is not already aware of. Enough new matter has however been added to the present edition to make it indispensable even to those who already have one or more of previous editions. In this connection we may mention chapters 2 and 4, on lawful acts done of malice in which many new cases are cited and new matter added, embracing the growing subject of slander of title, and of the distinction between slander of title and defamation. The tendency seems to be towards making more offenses under the head of slander and libel actionable than formerly. Defamations of character on account of having had contagious or infectious diseases, by the early common law were only classed as libelous when they referred to leprosy or plague, but slanderous statements are now actionable when made with reference to many other contagious diseases when damages can be proven. The work treats fully of lawful acts done by wrongful means, by fraud, deceit, slander of title, malicious prosecution, maliciously procuring refusal to contract. Unlawful acts by breach of absolute duty in procuring breach of contract, seduction, slander and libel, assault and battery, false imprisonment, trespasses upon property, conversion, infringement of patents, trademarks and copyrights, violation of rights of support, violation of water rights, nuisance, damage by animals, escape of dangerous things, events caused by negligence, by breach of duty to refrain from negligence. The work contains 470 pages, well bound in law sheep, full faced indented side notes which are of great advantage, enabling the reader to get a ready insight into the subject-matter of each page. The author is Melville Madison Bigelow, Ph. D., Harvard, who is too well known to need any introduction from us. Published by Little, Brown & Co., Boston.

COVENANTS WHICH RUN WITH LAND.

The law upon this important subject in all recent times has been found in a very chaotic state. The author has in this very lucidly written book explained the law of covenants running with the land, not only as it was historically, but as it is now, and has arrived at the conclusion that covenants may be enforced to affect property in the hands of successors to covenanting parties, as well where the land is burdened as where the land is benefited, and that the modern English doctrine supported by some American courts, greatly curtailing the carrying the burdens of covenants is probably based upon a misinterpretation of the common law, and that covenants should run more broadly than was conceived by the editor of Smith's Leading Cases in the note to Spencer's case. The autnor has very learnedly discussed the principles of the common law of warranty which control running covenants; the origin of covenants; the law as it was previous to the statute of 32d Henry VIII. and its effects; covenants in leases; running benefits and burdens with fee estates in modern law; benefits and burdens; parties affected by covenants in modern law, and incidentally the extinguishment of covenants; requirements of covenants; seals; parol agreements; stipulations for the grantees in deeds poll; necessity of a grant between the parties; separate execution of the covenant; corporeal and incorporeal hereditaments; substance of the covenant; necessary wording and naming the parties; most frequent classes of covenants; maintenance of fences, walls and mill-dams; buildings and use of party-walls; leaving open ways and parks; restricting building to a particular line; restricting the kind of uses of property in a particular locality; enforcement in equity and equitable easements. There is also an appendix of forms for various agreements relating to running covenants. By some it has been thought that there should be no power to charge real property with burdens of agreements effecting its use, but in recent years as cities increase in number and size and land enhances in value, it is more generally conceded that the continued use of property in a particular locality for a continuing purposeis an important element in the value and desirability of investment, and is a necessity as well to the public in making outlays in local improvements as to individuals who expend their money upon the confidecne that their buildings can have a permanent use for the purposes for which built. The law upon this subject is very difficult to study as early American precedents are rare, and the early English law has been in great confusion in consequence of conflicting interpretations placed upon the older English cases. Members of the profession who have litigation in connection with covenants running with land will find this book of practical use. It contains 300 pages, well bound in law sheep. The author is Henry Upson Sims, of the Birmingham, Alabama, Bar. Published by Callaghan & Co., Chicago.

WEEKLY DIGEST

1. ACCEPTANCE—Indorsement.—The signature of the payee on the back of the draft attached to a bill of sale of the goods for the price of which the draft was made is not such an "indorsement" as will pass the legal title to the draft, especially where it is followed by the printed statement: "Draft not good unless above bill of sale is signed, and draft also properly indorsed."—GRAY TIE & LUMBER CO. v. FARMERS' BANK, Ky., 60 S. W. Rep. 537.

2. ACKNOWLEDGMENTS — Certificate — Validity.—Where the cashier of a bank took the acknowledgment to a mortgage made by his debtor to the bank, the fact that part of the proceeds went to pay off the cashier's debt did not give him such an interest therein as to invalidate his certificate of acknowledgment, since the bank had the sole interest in the loan. —BARDSLEY V. GERMAN-AMERICAN BANK, Iowa, 84 N. W. Rep. 1041.

3. ACTION—Another Action Pending.—A suit for the sale of property under an annuity mortgage to complainant for the payment of the mortgage debt will not be defeated because there is pending in the United States court a suit by heirs of the mortgagor against complainant for the partition of the mortgaged real estate, and for a sale if it could not be divided, since the same rights were not asserted, nor the same relief sought.—GILPIN V. CARROLL, Md., 47 Atl. Rep. 1021.

4. ADMINISTRATION—Injunction—Payment of Decedent's Debts.—Plaintiff's mother died, leaving substantially no personal property, and plaintiff, an infant, as her only heir. Decedent's husband was appointed her administrator, and obtained an order to sell the real estate for payment of her debts, among which was the undertaker's bill for her burial, for which the husband was liable. Other bills were for provisions furnished the family, and druggist's and physician's bills, for which he was *prima facie* liable. Held, that an injunction would lie at the suit of plaintiff to restrain the sale, since, being an infant, she could not protect herself, by obtaining a loan on the property and otherwise, against a sacrifice of her property.—DOLL V. CASH, N. J., 47 Atl. Rep. 1059.

5. ADVERSE POSSESSION.—Where owners of adjacent lands have a resurvey of their dividing line made, readjust their fences, cultivation, and occupancy of their respective premises to the line thus established, and they and their grantees acquiesce in the correctness of the lines as established by such survey for more than 15 years, such occupancy is sufficient to start and uphold the statute of limitations to the lands thus occupied.—ZIMMERMAN V. GINTHER, Kan., 63 Pac. Rep. 657.

6. ASSIGNMENT FOR BENEFIT OF CREDITORS — Creditor's Lien.—Defendant conveyed property in trust for all his creditors, and among the debts so secured was one to plaintiff, on which she soon after secured judgment. In subsequent proceedings between the trustee and defendant, involving the administration of the trust, plaintiff's judgment was audited, and she afterwards received several small payments thereon; but, after the cause had been pending for four years, plaintiff brought an action to subject some after-acquired property of defendant's to the lien of her judgment. Held, that it was error to dismiss such action on the ground that plaintiff's participation in the prior proceedings was an election to proceed under the trust deed, which precluded suit on the judgment, since plaintiff's lien under the trust deed and that under the judgment, though for the same debt, were distinct and on separate subjects.—MILLER V. BYERS, Va., 37 S. E. Rep. 782.

7. BANKRUPTCY—Claims—Rent Accruing after Adjudication.—Rent accruing under a lease after the lessee has been adjudicated a bankrupt, is not provable against his estate under Bankr. Act 1898, either as a fixed liability or an unliquidated claim.—IN RE MAHLER, U. S. D. C., E. D. (Mich.), 105 Fed. Rep. 428.

8. BANKRUPTCY—Homestead — Fraudulent Conveyance.—Where a debtor residing in Tennessee made a voluntary conveyance of his homestead in fraud of his creditors, and was subsequently adjudicated a bankrupt on his voluntary petition, in which he did not schedule such homestead, the trustee became, by operation of law, vested with the right to recover the property for the benefit of creditors, and such right was not affected by a subsequent reconveyance by the grantee to the bankrupt, nor did such reconveyance, under the decisions of the State courts, revest the bankrupt with a right of homestead in the property, or to the crops growing thereon, at the time of the filing of his petition. The claim of the wife of a bankrupt to a homestead right in property of her husband as against his trustee is one which a court of bankruptcy is without jurisdiction to determine in a case like the one at bar.—IN RE TOLLETT, U. S. D. C., E. D. (Tenn.), 105 Fed. Rep. 425.

9. BILLS AND NOTES—Bona Fide Holder.—Where a note was sued on by a *bona fide* holder for value as commercial paper, and the answer showed a defense good as against the indorsee, in that the note was not commercial paper, being payable in Pennsylvania, and the reply relied on a statute of Pennsylvania and decisions of that State making such a note commercial paper, not subject in the hands of a *bona fide* holder to the defense pleaded, a demurrer to the reply, on the ground that it was a departure, was erroneously overruled.—MIDLAND STEEL CO. V. CITIZENS NAT. BANK, Ind., 59 N. E. Rep. 211.

10. CANCELLATION.—A grantor who has not tendered back the consideration before commencing an action to cancel his deed, on the ground that it was delivered without his authority, is not entitled to relief.—HARKNESS V. CLEAVES, Iowa, 84 N. W. Rep. 1032.

11. CARRIERS—Live-Stock Shipment — Contract.—H delivered a car load of cows to defendant, as a common carrier, for shipment, without any special parol contract. He signed a written contract which contained nothing contrary to public policy. Held, that he could not defend upon the ground that the written contract was signed in haste and without reading. H accompanied the stock. Held, that it was his duty, and not that of the defendant, to see that the stock was fed and watered.—HENGSTLER V. FLINT, ETC. CO., Mich., 84 N. W. Rep. 1068.

12. CHATTEL MORTGAGE—Foreclosure.—The exercise of the mortgagee's right to take possession of mortgaged property on the mortgagor's default as provided by the terms of a chattel mortgage, and the mortgagor's act in securing such right by procuring a seizure of the property under a writ of sequestration, cannot be made the ground of an action for damages by the mortgagor.—WEDIG V. SAN ANTONIO BREW. ASSN., Tex., 60 S. W. Rep. 567.

13. CHATTEL MORTGAGE—Property—Attachment.—A mortgage on personal property within the State executed in another State according to the law there, but not conforming to Code, art. 21, § 49, requiring an affidavit by the mortgagee that there is a *bona fide* consideration, is not, on the ground of comity, superior to an attachment of the property of the mortgagor.—PLEASANTON V. PEOPLE'S NAT. BANK OF MIDDLETOWN, Md., 47 Atl. Rep. 1025.

14. CONTRACT—Joint and Several Liability—Joinder.—When all the parties who enter into a promise receive some benefit from the consideration, whether past or present, the promise is presumed to be joint and several, and one or more may be sued thereon with or without uniting all in the same suit.—SCHOWALTER V. BEARD, Okla., 63 Pac. Rep. 667.

15. CONTRACTS — Mutuality.—A contract providing that one party should receive certain commissions for insurance risks secured by him during a certain time, in the service of the other party, is not void for want mutuality of consideration or obligation; there being an implied obligation on the part of the first party to serve the other in good faith and to the extent of his ability during the life of the contract.—TRAVELERS' INS. CO. V. PARKER, Md., 47 Atl. Rep. 1042.

16. CONTRACT — Performance—Retaining Consideration.—Inevitable accident will not excuse the performance of a contract, where its essential purposes are still capable of substantial accomplishment, though literal performance has become physically impossible.—BOARD OF EDUCATION OF BATH TP., ALLEN CO., V. TOWNSEND, Ohio, 59 N. E. Rep. 223.

17. CORPORATIONS — Incorporation — Liability of Stockholders as Partners.—Code, § 1145, provides that a joint stock company may be created by presenting a certificate stating its name, amount of capital, etc., to the circuit court, which may grant a charter, which shall be recorded and certified to the secretary of state, but contains no provision requiring the capital stock to be subscribed before the company shall have a corporate existence. Section 1146 provides that the incorporation shall be complete when the charter is filed with the secretary of state. Held, that the stockholders of a corporation so organized, with articles fixing its stock at $10,000, are not liable for its debts, as partners, because only $7,000 was subscribed.—COALTER V. BARGAMIN, Va., 37 S. E. Rep. 779.

18. CRIMINAL EVIDENCE—Homicide.—Where the shot which killed deceased was fired at H, her brother, testimony showing that about five minutes before the killing defendant had drawn a pistol on H on a public road, threatening to kill him, was admissible as a part of the *res gestæ*, it appearing that H was then permitted to pass on to his home, where he came out into the yard with a gun and pistol as defendant passed, when the fatal shot was fired.—BURTON V. COMMONWEALTH, Ky., 60 S. W. Rep. 526.

19. CRIMINAL LAW—Assault on Officer—De Facto Officers.—In a prosecution for an assault on an officer engaged in the discharge of his duty, it was shown that the person assaulted had entered on the discharge of his duties as deputy sheriff under a valid appointment, but he had not taken the oath of office and filed his appointment for record, as required by law. Held, that the court correctly assumed he was a *de facto* officer; hence there was no error in refusing to submit that question to the jury.—BROWN V. STATE, Tex., 60 S. W. Rep. 548.

20. DAMAGES — Pleading — Demurrer.—Where the complaint prayed damages for injuries occasioned to plaintiff's person and property, real and personal, but did not specify the particular amount of damages sustained as to each, a demurrer to the complaint for ambiguity and uncertainty was improperly overruled.—FORBST V. KELSO, Cal., 63 Pac. Rep. 681.

21. DEEDS—Recitals—Estoppel.—Where a deed to a son by a husband and wife of land belonging to the wife recited that the purchase[money for the land had been paid by the husband, instead of by the wife, as recited in the conveyances to her, and she signed the deed with full knowledge of its contents, she is estopped from claiming that such recital is false.—KREPS V. KREPS, Md., 47 Atl. Rep. 1028.

22. ELECTIONS—Ballots—Certificate.—Under a statute forbidding the deposit in the ballot-box of official ballots unless certified by the city clerk, ballots from which such certificate has been accidentally omitted by the printer are still entitled to be counted after deposit in the ballot box.—O'CONNELL V. MATHEWS, Mass., 59 N. E. Rep. 195.

23. EMINENT DOMAIN—Bridge and Approaches.—A company organized to construct a bridge over the Ohio river is authorized to purchase, appropriate, and hold any interest in real estate, whether an estate in fee-simple or a less estate, which, in the opinion of the directors, will be required for the site of the bridge and of suitable avenues or approaches leading thereto.—COVINGTON & C. BRIDGE CO. V. MAGRUDER, Ohio, 59 N. E. Rep. 216.

24. EVIDENCE—Experiments.—Experiments made in the absence of parties interested in the results thereof are, as evidence, in the nature of hearsay, and, if received, the facts and condition under which they were made should be shown to have been identical with those of the case before the court.—SEIBERT V. MCMANUS, La., 29 South. Rep. 108.

25. FRAUDS, STATUTE OF — Contract to Make Will.—Where one agreed by parol, in consideration of a conveyance of real estate, to make a will in favor of another devising a life estate, with remainder to the grantor, the consideration consisting of the real estate, after conveyance the contract became executed, and hence not within the statute of frauds.—BIRD V. JACOBUS, Iowa, 84 N. W. Rep. 1052.

26. GOOD WILL—Sale.—Defendant having sold his wood yard to plaintiff, and agreed not to engage in the wood business while plaintiff was engaged therein, gave an employee two cords for his services, and a tenant eight cords in lieu of repairs. Held, that such acts did not constitute a breach of the agreement, for which plaintiff could recover damages.—PARKHURST V. BROCK, Vt., 47 Atl. Rep. 1068.

27. GUARANTY OF MORTGAGE DEBT—Extension of Time.—Where the holder of a mortgage and of a contract guarantying its payment extends the time of payment of the mortgage debt, without the consent of the guarantors, by a contract with a subsequent purchaser of the mortgaged property, who did not assume the mortgage, the guarantors are discharged from all liability thereon, since the time the mortgage was to run was an essential condition of the guaranteed contract.—ANTISDEL V. WILLIAMSON, N. Y., 59 N. E. Rep. 207.

28. HUSBAND AND WIFE—Alienation of Affections—Action.—Under V. S. § 2647, removing the common-law disabilities of married women, a declaration, in action for alienation of affections, alleging loss of husband's aid, comfort, and society, in consequence of defendant's wrongful acts, states a cause of action, since it alleges loss of *consortium*.—KNAPP V. WING, Vt., 47 Atl. Rep. 1075.

29. HUSBAND AND WIFE—Separate Estate.—Where a wife's conveyance of her separate estate to her husband recited that she appointed him trustee thereof for her children, and that the money was "to be held, used, and invested by him in such manner and at such times as he, in his discretion, may see proper," and that he agreed to "use, invest, and handle said money" according to his best ability, the husband, after having invested the money in land, had power to sell the land and reinvest the money; and the mere fact that he was authorized to reinvest the increase did not exclude power to reinvest the principal.—SCOTTISH-AMERICAN MORTG. CO. V. MASSIE, Tex., 60 S. W. Rep. 544.

30. HUSBAND AND WIFE—Transfer in Fraud of Creditors.—Where the wife's father paid one-third of the consideration for land purchased by the husband under an agreement, to which the wife was a party, that she should own one-third of the land and its proceeds, but the husband took the title to himself, a deed executed by him after he became insolvent, and after the wife's death, conveying one-third of the land to her infant son by direction of her father, will not be set aside at the instance of the husband's creditors.—SPARKS V. COLSON, Ky., 60 S. W. Rep. 540.

31. IMPEACHMENT OF WITNESS.—Accused has the right to show not only that the general moral character of a witness for the prosecution is bad, but also that his general character for truth and veracity is bad.—SMITH V. COMMONWEALTH, Ky., 60 S. W. Rep. 521.

32. INSURANCE — Estoppel — Agent.—Where an insurance soliciting agent represented to insured, who could not read English, that for additional consideration, which was paid, he could fix the policy so that a change in the use of the property from that mentioned would not forfeit the insurance, the company will not be estopped from pleading a provision contained in the policy contrary to the agent's representations, since the agent acted outside the scope of his employment, and estoppel only applies to representations of present or past facts, and not to future contingencies, except where the abandonment of an existing right is intended.—CORNELIUS V. FARMERS' INS. CO., Iowa, 84 N. W. Rep. 1037.

33. LANDLORD AND TENANT—Attachment for Rent.—In an action for rent, in which a landlord's attach-

ment was levied on a printing press, a mortgagee of the press claimed a superior lien under a chattel mortgage executed prior to delivery to the tenant, but not recorded till after such delivery. Held, that the fact that the acknowledgment of such chattel mortgage was taken before one of the agents of the landlord, who had charge of the management of the leased premises, and who had other knowledge of the mortgage, was sufficient to charge the landlord with notice of the mortgage.—McCLELLAND v. SAUL, Iowa, 84 N. W. Rep. 1035.

34. LANDLORD AND TENANT—Verbal Lease.—Where a tenant, after the expiration of five years, for which the premises had been verbally leased, the rent being payable monthly, held over, and the landlord accepted rent, the tenancy was from month to month, since, the contract of leasing having been performed, it could not be regarded as a void one, creating a tenancy from year to year.—BARLUM v. BERGER, Mich., 84 N.W. Rep. 1070.

35. LIBEL—Participation in Libelous Publication.—Where the defendant in a libel suit wrote an article to a newspaper, which rewrote and changed it before it was published, and the publication of the article as changed is the libel relied on, the defendant is no liable because he participated in the publication, butt it must be shown that he participated in the publication of the libelous matter contained therein.—KLOS v. ZAHORIK, Iowa, 84 N. W. Rep. 1046.

36. LIBEL—Privileged Communication.—Where defendant wrote to R & Son that plaintiff was selling monuments on representations that the work was done by R & Son, but was having the work done by others, wherever it could be done cheapest, the letter was not a privileged communication, unless defendant was in a relation to R & Son rendering it a duty to make the communication.—DAVIS v. WELLS, Tex., 60 S. W. Rep. 566.

37. LIFE INSURANCE — Fraudulent Assignment. — A voluntary assignment by one, when insolvent, to his wife, of a policy on his life, is presumptively fraudulent.—IN RE MCKOWN'S ESTATE, Pa., 47 Atl. Rep. 1111.

38. LIFE INSURANCE — Minor. — A policy of life insurance issued on the life of a minor, payable to him if living at maturity, and to his executors, administrators, or assigns, in case of death before maturity, is not absolutely void; nor are notes given by him for premiums void, although the insured has power to elect to avoid both on arriving at majority; nor is his written assignment of such policy during minority necessarily void.—UNION CENT. LIFE INS. CO. v. HILLIARD, Ohio, 59 N. E. Rep. 280.

39. LIFE INSURANCE—Representations—Warranties. —Where it is contended in an action on a life certificate that defendant is estopped by the knowledge of its agent from relying on false representations of insured in the application, it is not error to refuse instructions, based on the theory that the representations were warranties, which exclude the issue of estoppel, since the doctrine of waiver applies to warranties as well as mere false representations.—NATIONAL FRATERNITY v. KARNES, Tex., 60 S. W. Rep. 576.

40. MARRIED WOMAN — Wife as Garnishee of Husband.—Where a judgment is against two defendants, an attachment *fieri facias* may be issued against both, though one of them is deceased) and his personal representatives have not been made parties; for, while the officer in executing the writ could not attach any of the decedent's property, it was proper for the writ to follow the judgment. — FORBES v. THOMPSON, Del., 47 Atl. Rep. 1018.

41. MASTER AND SERVANT—Assumption of Risk—Negligence.—A servant was injured by having her hand caught between the rollers and the drum of a mangle while feeding the same, and she contended that she would not have received the injuries if the guard plate had been properly adjusted. The plate was too high, allowing her hand to pass under it and into the machine. She testified that, relying on the guard rail, she did not realize that there was any danger in operating the machine. The plate was adjusted by the managers, and employees were forbidden to change the adjustment. Held not to show an assumption of risk which would authorize a nonsuit on the motion of the master in an action against him for such injuries.—STAGER v. TROY LAUNDRY CO., Oreg., 63 Pac. Rep. 645.

42. MASTER AND SERVANT — Fellow-Servants — Safe Place to Work.—The law with reference to a safe place to work in has application to a coal mine, where the day crew of an undercutting machine are allowed to go to work without any warning as to the dangerous condition of the face of the coal where they were to work, making a fall of coal likely, the evidence tending to show that the employer knew it was not reasonably safe.—CONSOLIDATED COAL CO. v. GRUBER, Ill., 59 N. E. Rep. 254.

43. MASTER AND SERVANT—Negligence—Evidence.—Where it is charged as negligence that a trolley car was delivered to the plaintiff, a conductor, from the defendant's barn, in a condition unfit for use, it is incumbent upon the plaintiff to establish the negligence; and the mere fact that the trolley pole is found bent after having run a mile, without giving any indications of being in an unsafe condition, is not evidence that it was in bad condition when taken from the barn.—WHITCOMB v. DETROIT ELECTRIC RY. CO., Mich., 84 N. W. Rep. 1072.

44. MINES AND MINING — Parol Grant.—Where the owner of land orally granted mining privileges therein to defendants at a time when mining operations in the locality were being conducted for lead only, and not for zinc, and defendants discovered zinc, which they did not mine for several years, because there was no market, such facts did not show that the license was contemplated by the parties as restricted to the mining of lead only, but the privilege extended to zinc.—HOSFORD v. METCALF, Iowa, 84 N. W. Rep. 1054.

45. MUNICIPAL CORPORATION—Defective Sidewalk—Negligence.—K, a girl of 14 years old, had passed a hole in the public highway for several weeks twice a day; knew its existence, had avoided it every time she passed it previous to the accident; stepped into it in broad daylight. There was nothing to hinder her from seeing it, and she testified that if she had been looking she would have seen it. Held, that she was guilty of contributory negligence, and could not recover.—KING v. COLON TP., Mich., 84 N. W. Rep. 1077.

46. MUNICIPAL CORPORATIONS—Defective Sidewalks —Negligence.—That a person stepping into a hole in a sidewalk, which was filed with snow and ice, knew of the defect, does not show her guilty of contributory negligence as matter of law, where she did not have the defective in mind at the time.—VERGIN v. CITY OF SAGINAW, Mich., 84 N. W. Rep. 1075.

47. MUNICIPAL CORPORATION.—Code § 1125, authorizing the city to "employ" special policemen at elections to prevent violation of the election law, does not make the city liable for the services of such policemen, since the word "employ" does not imply an obligation to pay for services rendered, except when applied to a servant or hired laborer.—MOUSSEAU v. CITY OF SIOUX CITY, Iowa, 84 N. W. Rep. 1027.

48. MUNICIPAL CORPORATION — Improvements—Assessments.—Failure of an improvement ordinance to state the height of the curb to be constructed on each side of the street is not a jurisdictional defect, making the judgment confirming a special assessment therefor subject to collateral attack, and hence is no defense to an application for judgment of sale for delinquent installments.—BLOUNT v. PEOPLE, Ill., 59 N. E. Rep. 241.

49. NUISANCES — Damages—Noxious Gases.—Where smoke and noxious gases from smelting works injured the property and endangered the health of adjoining landowners, an action for damages lies, though the business was carried on in a suitable locality, with the most approved appliances, and furnished employment, directly or indirectly, to nearly the whole community.—DUCKTOWN SULPHUR, COPPER & IRON CO. v. BARNES, Tenn., 60 S. W. Rep. 593.

50. PARENT AND CHILD—Deeds of Adoption.—A deed of adoption, which stated that the parent fully and voluntarily consented to the adoption of his children by a husband and wife "as their own children, the same as if unto them in lawful wedlock born," sufficiently complied with Code 1873, § 2308, which provides that the deed of adoption shall state that such child is given to the person adopting for the purpose of adopting as his own child.—BRESSER v. SAARMAN, Iowa, 84 N. W. Rep. 920.

51. PARTNERSHIP—Withdrawal of Partner—Notice.—A partner cannot escape liability for the price of goods sold by plaintiffs to the firm on the ground that he had given them notice before the sale that he had withdrawn from the firm, the fact being that his proposed withdrawal was subsequently abandoned, and that he was a partner at the time the goods were sold. —SPRAGANS v. LAWSON, Ky., 60 S. W. Rep. 378.

52. PLEADING — Counterclaim.—In an action to recover damages for trespass and destruction of crops by defendant's cattle, defendant cannot plead as a counterclaim the damages which he has suffered from trespasses by plaintiff's cattle, though they resulted from plaintiff's breach of his agreement to keep up a portion of the division fence, as the claim of defendant did not arise out of the transaction stated in the petition.—RENAKER v. SMITH, Ky., 60 S. W. Rep. 407.

53. PLEADING — Inconsistent Pleas.—The pleas of *non est factum* and no consideration are not inconsistent, as the proof of one does not necessarily disprove the other; and therefore, where both are made, the defendant will not be required to elect.—SMITH v. DOHERTY, Ky., 60 S. W. Rep. 880.

54. PRINCIPAL AND AGENT—Agreement to Purchase Judgment.—Mere permission from a judgment debtor to a third party to purchase the judgment against him, without furnishing any money therefor, or agreeing to take the judgment after the purchase, or to pay anything for the services, and such party's promise to do so, do not constitute such third party an agent for the purchase, obligating him to transfer the judgment to the debtor on being reimbursed the amount paid.—WALTON v. DORE, Iowa, 84 N. W. Rep. 928.

55. PRINCIPAL AND SURETY — Contractor's Bond—Judgment—Res Judicata.—A judgment against a contractor for damages for breach of contract is not *res adjudicata* against the surety on his bond, where the bond did not stipulate that the surety should be bound by such a judgment, and he was not a party or privy to the action, though he had notice thereof.—MCCONNELL v. POOR, Iowa, 84 N. W. Rep. 968.

56. PRINCIPAL AND SURETY—Defaulting County Treasurer.—Where a county treasurer deposits county money with a bank, which, knowing the nature of such money, appropriates it to the payment of a private debt against the treasurer, who defaults in such sum, the sureties on his bond, against whom suit is brought by the county, may bring in the bank as a party defendant, and may be subrogated in the one judgment to the rights of the county against the bank for the amount of the judgment rendered against them, since the county could have joined the bank as a party defendant.—SKIPWITH v. HURT, Tex., 60 S. W. Rep. 423.

57. PROCESS—Names of Parties—Service.—It is better in judicial process, or other legal documents, to use the full Christian names and surnames of parties therein, not mere initials. Case of service of process on the wrong person, having the same initials of Christian name as the defendant intended, discussed —SLINGLUFF v. GAINER, W. Va., 37 S. E. Rep. 771.

58. PUBLIC LANDS—Cutting Timber from Homestead. —Rev. St. § 2461, originally enacted in 1831, which makes it a criminal offense to cut or remove timber from any lands of the United States, has no application to the cutting of timber by a *bona fide* homesteader, and in a prosecution thereunder for the cutting of timber from a homestead by, or under authority from, the homesteader, the vital question is as to whether the homestead was taken and is being held in good faith, with intent to acquire title thereto by a compliance with the requirements of the homestead act.—GRUBBS v. UNITED STATES, U. S. C. C. of App., Eighth Circuit, 105 Fed. Rep. 314.

59. RAILROAD COMPANY — Insolvency — Preferential Debts for Supplies.—When a railroad corporation becomes in fact insolvent, one result is to make the mortgage bondholders the real owners of the property, and to charge them with the obligation to keep it a going concern, that it may continue to discharge its duties to the public and the value of the security may be maintained. Hence, so long as they permit the insolvent company to remain in control, it may properly be regarded as their agent for that purpose, and to contract for the necessary day by day supplies, to be paid for and from the current income, or, if necessary, from the proceeds of the property when sold, in preference to the mortgage debt. But such implied authority does not go beyond the obligation to preserve the property and maintain it in operation, and for that reason the courts recognize a practical distinction between claims for supplies necessary for that purpose, and those for supplies or materials purchased for reconstruction or to make substantial betterments.—LEE v. PENNSYLVANIA TRACTION CO., U. S. C. C., E. D. (Penn.), 105 Fed. Rep. 405.

60. RAILROAD COMPANY—Receivers—Revival—Pleading.—Plaintiffs in an action against the receivers of a railroad, on dismissal of the suit by reason of the discharge of the receivers owing to a sale of the road suggested a revivor against the purchaser, and judgment *nisi* was entered against the purchaser, and a *scire facias* issued. The purchaser moved to quash the *scire facias* on the ground that Code 1892, § 699, providing that suits against public officers, trustees, or others in a similar position may be sued in the name of their successors, did not authorize the revival, but, on the overruling of the motion, pleaded generally to the merits. Held, that by pleading to the merits the purchaser entered its appearance, and waived any objection to the revival.—MEMPHIS & C. R. CO. v GLOVER, Miss., 29 South. Rep. 69.

61. RAILROAD COMPANY—Right of Way—Grant.—A grant of a right of way to a railroad company "for the purposes of constructing, maintaining, and operating thereon a railroad, with all the necessary appurtenances, and for all uses and purposes connected with the construction, repair, maintenance, and complete operation of said railroad," allows the company, after constructing a surface road, to elevate it, on occasion arising therefor, without liability for damages therefor and the consequences flowing therefrom.—KOTZ v. ILLINOIS CENT. R. CO., Ill., 69 N. E. Rep. 240.

62. REFORMATION OF INSTRUMENTS — Mistake.—A written agreement respecting a sale of realty cannot be reformed by the grantor for mistake, where the grantee states that it correctly embodied the contract, and truly represented what he required as a condition precedent to the purchase, and the grantor's mistake arose from his failure to discover the plain letter of the agreement, which was not ambiguous.—KING v. HOLBROOK, Oreg., 68 Pac. Rep. 651.

63. RELEASE—Settlement—Mutual Mistake.—Where a passenger injured by the negligence of a railroad company makes a written settlement in full with the

company before it is known that he has received severe internal injuries, the settlement is binding, and he cannot recover for such additional injury by showing that it was not known by the parties at the time of the settlement, and was not included therein.—HOUSTON, ETC. R. CO. v. MCCARTY, Tex., 60 S. W. Rep. 429.

64. REMOVAL OF CAUSES—Federal Question—Supersedeas Bond.—An action on a *supersedeas* bond given on an appeal from the decree of a circuit to the circuit court of appeals, in accordance with Rev. St. § 1000, to recover the damages sustained by the appellee, is one involving questions arising under the laws of the United States, and is removable into the federal court.—CRANE v. BUCKLEY, U. S. C. C., N. D. (Cal.), 105 Fed. Rep. 401.

65. REPLEVIN—Bond by Defendant to Retain Possession.—A constable has authority to execute a writ of delivery directed to him, and the defendant, having executed bond in order to retain possession of the property, cannot escape liability thereon on the ground that the writ was not directed to the constable at the request of plaintiff.—TERRY v. JOHNSON, Ky., 60 S. W. Rep. 800.

66. SALE—Change of Possession—Attachment.—The execution and delivery, by the president of a corporation, of a bill of sale of a stock of goods which were to be sold and the proceeds applied upon its indebtedness to the vendee, was not accompanied or followed by the open, visible and notorious change of possession, required by the law of Illinois to protect the goods from attachment by the creditors of the vendor, where the only acts indicating a change of ownership consisted in insuring the goods in the name of the vendee, opening a new set of books, billing all the goods sold in the name of the vendee, and placing the proceeds of such sales to its credit, while the stock of goods remained in the custody of the same persons as theretofore, and was apparently in the possession of the vendor so faras appeared to the public, and was sold in the same way as theretofore down to the day of the attachment.—DOOLEY v. PEASE, U. S. S. C., 21 Sup. Ct. Rep. 329.

67. SALES — Construction of Contract to Furnish Boilers.—Where the bidder for the furnishing of boilers, required by a contract for the construction of a building, instead of bidding upon the specifications contained in such contract, submitted a proposition and specifications of its own, which were, at its instance, attached to the contract subsequently made between such bidder and the general contractor as modifying the specifications of the original contract, a guaranty contained in such proposition as to evaporating capacity and the tests to be met must be construed as superseding the provisions of the original specifications relating to the same subjects, rather than as having been voluntarily offerred by the bidder as additional thereto.—HEINE SAFETY-BOILER CO. v. FRANCIS BROS. & JELLETT, U. S. C. C., E. D. (Penn.), 105 Fed. Rep. 413.

68. SALES—Fraud — False Representations.—Where the seller of goods alleged that the buyer had falsely represented himself as solvent at the time of the sale, the value of the buyer's stock at that time was material, and hence admissible in an action by the seller to recover the goods. The fact that a buyer of goods had on hand at the time of a purchase alleged to be fraudulent a much larger stock than the trade of his locality would justify was relevant to the issue of fraud in the purchase, and hence testimony of witnesses as to the value of the usual stock carried in such a place, though a species of opinion evidence, was properly admitted; this being the only way to elucidate the point.—PHELPS, DODGE & PALMER CO. v. SAMSON, Iowa, 84 N. W. Rep. 1051.

69. SPECIFIC PERFORMANCE—Patents.—A vendor of a patent right cannot maintain a suit for specific performance of the contract of sale in order to enforce the payment of an agreed price therefor, since he has an adequate remedy at law.—ANDERSON v. OLSEN, Ill., 59 N. E. Rep. 289.

70. STATUTE—Foreign Statutes — Adoption.—Where the legislature adopted an English statute prohibiting carriers from giving undue preferences to particular persons, it will be presumed that the settled construction given to such statute by the English courts was intended to be incorporated in the act, and such construction will govern in the interpretation thereof.—NORFOLK & W. RY. CO. v. OLD DOMINION BAGGAGE CO., Va., 37 S. E. Rep. 784.

71. SUBROGATION — Wrongful Pledge of Another's Property.—Where defendant's testator, wrongfully pledged to a bank for his own debt negotiable bonds belonging to plaintiff, and defendantpaid the debt, thereby releasing the bonds, she is not subrogated to the rights the bank had in the bonds, though the estate is insolvent.—GRAND COUNCIL ROYAL ARCANUM v. CORNELIUS, Pa., 47 Atl. Rep. 1125.

72. TAXATION OF BICYCLES — Constitutionality.—Laws 1899, p. 152, authorizing a tax of $1.25 on bicycles within certain counties only for the purpose of constructing, maintaining, and repairing bicycle paths on highways and other places, creates a tax, and not a license, and is a local act, in violation of Const. art. 4, § 23, subd. 7, prohibiting special laws for laying, opening, and working on highways.—ELLIS v. FRAZIER, Oreg., 63 Pac. Rep. 642.

73. TELEGRAPH COMPANIES—Delivering Message—Negligence.—In an action against a telegraph company for damages for failure to promptly deliver a message sent plaintiff by one acting as his agent, the fact that the message was transmitted without charge, because of the sender being an employee of defendant, was no defense.—WESTERN UNION TEL. CO. v. SNODGRASS, Tex., 60 S. W. Rep. 368.

74. TENANTS IN COMMON — Acquisition of Title.—Where all but one of the tenants in common of mortgaged land request the mortgagee that, if he purchases it at the mortgage sale, he will convey it absolutely to the other tenant in common on his securing to the mortgagee the debt due him, the title conveyed pursuant thereto does not inure to the benefit of the others.—WATSON v. WATSON, Pa., 47 Atl. Rep. 1096.

75. TENANCY IN COMMON — Rents and Profits.—Under a will devising land to tenants in common, and directing that one of them shall have the sole management and control of the same for a stated time, he is not entitled to the use of the property during such time, but only to the management and control thereof, and is, therefore, chargeable with rents and profits.—DUNAVANT v. FIELDS, Ark., 60 S. W. Rep. 420.

76. TRADE-NAMES — Names Incidentally Denoting Quality.—Where the general purpose of a trade-name adopted by a manufacturer is to identify the origin or ownership of the articles to which it is attached, his right to protection in the exclusive use of such name is not affected by the fact that the words used also denote quality, and carry with them a claim of excellence incident to the goods of such origin or ownership.—THOMAS G. PLANT CO. v. MAY CO., U. S. C. C. of App., Sixth Circuit, 105 Fed. Rep. 375.

77. TRESPASS—Title—Evidence.—In the absence of rebutting evidence, a recital in a deed executed in a foreign country that the grantors are the heirs at law of one who died intestate and seised of the land conveyed is sufficient evidence of those facts to entitle one claiming under it to maintain trespass against a naked trespasser, where no adverse claim has ever been made to the land, and 80 years have elapsed since the date of the acknowledgment.—YOUNG v. SHULENBERG, N. Y., 59 N. E. Rep. 135.

78. TRIAL—Failure to Give Instruction Not Asked.—The failure to give an instruction as to contributory negligence where none was asked by defendant was not error.—FELTON v. CURD, Ky., 60 S. W. Rep. 297.

79. TRIAL—New Trial—Prejudice of Jurors—Newspaper Publications.—Where a trial lasted a greater part of two months, during which a leading newspaper of the city in which it was held, and where nearly all of the jurors resided, continued to publish articles apparently intended to influence the determination of the case, and calculated strongly to prejudice public sentiment against one of the parties, and to present the other in a most favorable light, some of which articles were admittedly read by some of the jurors, such facts afford ground for a new trial on behalf of the party against whom the articles were directed, without regard to the question by whom such articles were instigated.—MORSE v. MONTANA ORE PURCHASING CO., U. S. C. C., D. (Mont.), 105 Fed. Rep. 837.

80. TRIAL — Production of Books — Corporation.—If the books of a corporation which is a party to pending litigation are at their place of business in the parish where the suit is pending, and in the custody of one of their officials in such parish, the process of the court to reach these books and have them produced in court will lie, notwithstanding the nominal or legal domicile of the corporation may be in another parish.—STATE v. ALLEN, La., 29 South. Rep. 114.

81. TRUSTS — Creation — Instrument in Writing.—Code, § 1041, provides that no trust can be created in land except by an instrument in writing signed by the party declaring the trust, or his agent or attorney. The defendant wrote a letter to a landowner inclosing a deed to be executed by the latter, and also referring to and inclosing a letter from A suggesting that the landowner convey the property to defendant to enable the latter to mortgage it and redeem it from a prior mortgage sale thereof. Held, a sufficient instrument in writing to constitute a trust in favor of the owner on a subsequent conveyance to the defendant, which would support a suit to enforce a reconveyance.—WIGGS v. WINN, Ala., 29 South. Rep. 96.

82. TRUSTS—Increase — Legatees.—Where property is given in trust, the income to be paid certain persons for life, thereafter the trust estate to be distributed among others, and the trustee makes an investment in bonds, which he sells at a premium, and shares of stock of a corporation are included in the trust estate appraised at $42 per share, and the franchises and property of the corporation are condemned, and an amount is paid as damages so that the trustee receives $96 per share, such profits and increase belong to the *corpus*, and not the income, of the estate.—IN RE GRAHAM'S ESTATE, Pa., 47 Atl. Rep. 1108.

83. USURY—Recovery. — Where a debtor borrowed money from the daughters of his creditor to pay his debt to their father, and afterwards borrowed money from their mother to pay the debt to them, he cannot recover from the mother usury paid to the daughters or their father, the transaction being in good faith, and in fact a loan of money by the mother to the debtor.—STEPHENSON v. SHIRLEY, Ky., 60 S. W. Rep. 397.

84. VENDOR AND PURCHASER — Sale of Land Previously Conveyed to Another.—Where defendant had previously conveyed to another real estate which he conveyed to plaintiff in exchange for other property, plaintiff was entitled to recover damages, though defendant, in the previous deed, had reserved an option on the property.—CAUMISAR v. CONLEY, Ky., 60 S. W. Rep. 575.

85. VENDOR'S LIEN — Foreclosure—Parties—Redemption.—The owner of a note secured by a vendor's lien on real estate acquired prior to a suit to foreclose the lien acquired by a prior note, to which proceeding he was not made a party, was entitled to redeem from the purchaser at the sale under such proceedings.—ROGERS v. HOUSTON, Tex., 60 S. W. Rep. 445.

86. VENDOR'S LIEN — Rescission. — Where vendor's lien is retained in deed or in notes given for deferred payment, and the vendee makes default, the vendor may rescind and recover the land, or affirm contract and have judgment for his debt, with foreclosure of lien.—CURRAN v. TEXAS LAND & MORTGAGE CO., Tex., 60 S. W. Rep. 466.

87. WATER — Navigable Rivers — Riparian Rights.—Where an island arose in a navigable river apart from riparian owners' land, such owners can claim no title thereto by reason of their riparian rights, though the island was afterwards joined to their land, since it did not become a part thereof by gradual accretion to or relliction from the shore. — HOLMAN v. HODGES, Iowa, 84 N. W. Rep. 950.

88. WILLS—Construction—Dower.—A life estate in the tract of land containing testator's dwelling house was devised to his wife, remainder to his nephews; and a life estate in another tract of his land was devised to her, but no disposition was made of the remainder. Held, that Code, § 3867, requiring a dower in fee of a surviving spouse to contain the dwelling house, if so desired, did not entitle the widow, who had acquired the right of all the other heirs, to have more than half of the dower interest taken from the tract in which she had the life interest.—MOREY v. MOREY, Iowa, 84 N. W. Rep. 1039.

89. WILLS — Determinable Estate — Executory Devises.—A will contained this provision: "Lot No. 21 give and devise to my son, F, he to pay to his mother during her natural life sixty dollars per annum; and, if the said F die without issue, and his wife survives him, she shall have the use of said lot during her natural life, and at her death the said property shall revert to all my surviving heirs." Held, that F took an estate in fee in the lot, determinable on his death without issue, in which event the estates of the wife and surviving heirs would take effect as executory devises. — STONER v. WUNDERLICH, Pa., 47 Atl. Rep. 945.

90. WILLS—Equitable Conversion.—Where a testator devised his entire estate to his wife, to her own use, benefit, and behalf "forever," the same to remain for her just and necessary support during her natural life, with any remainder to his children, the wife took merely a life estate in the property, with authority to use the whole thereof if necessary for her support.—TROUT v. ROMINGER, Pa., 47 Atl. Rep. 960.

91. WILLS—Estate Granted—Conditions.—Plaintiff's husband devised his dwelling house in B to her, her heirs, executors, administrators, and assigns, forever, on the condition that she continue to reside in B and not marry again before April 10, 1885. In 1886, by a codicil, he devised a residence outside of B to his daughter, with the request that she allow plaintiff to "have a home" there whenever she wished. Held, that plaintiff took an estate in fee-simple absolute in such dwelling house, never having married, and having resided in B until after 1885.—JENKINS v. HORWITZ, Md., 47 Atl. Rep. 1023.

92. WILLS—Life Estate with Power of Disposition.—Testator devised to his wife all his lands, etc., after payment of his debts and a legacy to his son, during life, to manage or sell as she might think proper; all the property left at her death to be sold, and proceeds to be divided among his children. Held, under Code, § 1048, providing that where absolute power of disposition is given, not accompanied by a trust, and no estate in remainder is limited on the estate of the donee in the power, he takes an absolute fee, the widow took the fee in the land. — YOUNG v. YOUNG, Ala., 29 South. Rep. 61.

93. WITNESSES—Competency—Husband and Wife.—Acts 27th Gen. Assem. ch. 108, § 1, prohibiting husband and wife from being witnesses against each other, except in civil actions brought by judgment creditors against husband or wife to set aside conveyances from one to the other for fraud or want of consideration, is not unconstitutional, because changing rules of evidence or competency of witnesses.—BURK v. PUTNAM, Iowa, 84 N. W. Rep. 1003.